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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SWEET BRIAR INSTITUTE, *Appellant,*

v.

ROBERT Y. BUTTON, *et al., Appellees.*

On Appeal from the United States District Court for the Western District of Virginia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the abstention order and judgment of the United States District Court for the Western District of Virginia, entered on December 7, 1966, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia, and the opinion of United States District Judge John D. Butzner, Jr., dissenting therefrom, are as yet unreported. Copies of the opinion, the dissenting opinion, the Order of Abstention, an Order on Post-Trial Motions entered December 29, 1966, and an amending order entered January 12, 1967 are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U.S.C. § 1331 and section 207 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-6 (1964), to enjoin defendant state officers from enforcing against appellant, pursuant to section 55-29, Code of Virginia (1950), the requirement of racial discrimination imposed by section 55-26, Code of Virginia (1950). The judgment from which this appeal is taken was rendered December 7, 1966 by a specially constituted district court of three judges and denied temporary and permanent injunctive relief by ordering abstention. An order denying appellant's motion for new trial was entered December 29, 1966, and notice of appeal was filed January 4, 1967. An order amending the order of December 29, 1966 was entered January 12, 1967.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253 (1964). This action is one required by 28 U.S.C. § 2281 (1964) to be heard and determined by a district court of three judges because interlocutory and permanent injunctions are sought restraining the enforcement, operation and execution of sections 55-26 and 55-

29 of the Code of Virginia (1950) by restraining the action of appellee officers of the Commonwealth of Virginia in the enforcement and execution of said statutes on the ground of their unconstitutionality. The statutes attacked provide, in pertinent part:

> § 55-26. Validity.—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons . . . shall be as valid as if made to or for the benefit of a certain natural person . . . .
>
> . . .
>
> § 55-29. . . . enforcement of the execution of the trust.— . . . . In enforcing the execution of any such trust a suit may be maintained against the trustees in the name of the Commonwealth when there is no other party capable of prosecuting such suit.
>
> . . .

Virginia's statutes that validate and provide for the enforcement of educational trusts, and Virginia's statutes antecedent to section 55-29, are set forth in Appendix B to this Jurisdictional Statement.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Harman* v. *Forssenius,* 380 U.S. 528 (1965); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960); *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935).

QUESTIONS PRESENTED

1. Whether enforcement by Virginia state officers of a testamentary restriction limiting beneficiaries of an educational trust to "white girls and young women" is enjoinable under the Fourteenth Amendment to the Constitution of the United States or sections 202-204 and 207 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 through 2000a-3 and 2000a-6 (1964),[1] where Virginia statutes imposed the racial restriction as a condition to validity of the trust and also impose the duty to enforce it upon such state officers, and the threatened enforcement is causing irreparable injury.

2. Whether, in an action to enjoin such enforcement, a federal court may properly abstain upon the ground that the state courts have not ruled upon the controversy where:

(a) the Virginia statute requiring the racial restriction is unambiguous and has been authoritatively construed by the Supreme Court of Appeals of Virginia;

(b) enforcement of the restriction by Virginia state officers would in itself constitute state action, however any questions of state law might be resolved; and

(c) sections 202-204 and 207 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 through 2000a-3 and 2000a-6 (1964), give plaintiff a right to be free from threats or attempts to enforce the restriction.

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[1] Pub. L. 88-352, 88th Cong., 2d Sess., ch. 2, §§ 202-204, 207, 78 Stat. 244, 245 (1964). Hereinafter this Act is cited by reference to section numbers of the Civil Rights Act of 1964 and of Title 42, United States Code.

3. Whether, in such an action, a federal court may properly abstain upon the ground that another proceeding against the same defendants seeking other relief[2] from the same racial restriction is pending in a Virginia state court, in which proceeding:

(a) an interlocutory decree has been entered (after long delay, but promptly after institution of the federal action) sustaining a demurrer solely upon the grounds that the bill failed to disclose (i) any controversy justiciable under Virginia law, (ii) any ambiguity in the racial restriction requiring interpretation, or (iii) any change of circumstances entitling appellant to relief under the equitable doctrine of cy pres;

(b) the interlocutory decree does not dismiss the proceeding, but grants leave to amend; and

(c) an amended and supplemental bill and an answer thereto have been filed and the case is presently pending subject to an express reservation of plaintiff's federal claims for adjudication in the federal action.

4. If abstention in such an action is proper, whether plaintiff may properly be required to submit its federal contentions for adjudication by the Virginia courts (as distinguished from exposing its federal contentions in order to enable the Virginia courts to adjudicate upon questions of state law with the federal contentions in mind), before returning to the federal district court for relitigation of federal contentions decided adversely by the Virginia courts.

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[2] A subsidiary question is whether abstention in this case may properly be based upon the proposition that relief in the state court proceeding might be broader than that available in the federal action. See App. A, pp. 4a, 12a-14a.

STATEMENT

The appellant in this action is seeking to enjoin Virginia state officers from enforcing a racial restriction contained in a will under which appellant holds property as trustee of an educational trust. The racial restriction was required by Virginia law at the time the will was written as a condition to the validity of any educational trust. Virginia law still contains this requirement, *Triplett* v. *Trotter,* 169 Va. 440, 193 S.E. 514 (1937), and imposes the duty to enforce provisions of educational trusts upon appellee state officers. (App. B, p. 36a).

Appellant initially sought relief from the racial restriction in state court, but after some twenty months had been unable to obtain any order whatsoever from the state court, although irreparable injury to appellant was continuously occurring. Thirty-one days after the federal action was instituted, the state court entered an order sustaining a demurrer to appellant's bill of complaint, on the state law ground that the bill failed to disclose a case of controversy justiciable under Virginia's declaratory judgment statute. (App. C, pp. 46a-48a). By leave of the state court, an amended and supplemental bill has been filed, reserving the federal claims for adjudication in federal court. (R. 148-190).

The court below held that abstention was proper under these circumstances, both for the purpose of obtaining an interpretation of the Virginia law requiring the racial restriction and in the interest of comity with respect to the Virginia court in which the parallel proceeding is pending. (App. A, pp. 4a, 9a-11a).

The presence of unconstitutional state action and the existence of continuing irreparable injury to appellant

clearly entitle appellant to injunctive relief. Abstention is not permissible or appropriate to determine the meaning of the Virginia statute requiring racial segregation, because the Supreme Court of Appeals of Virginia has already interpreted the statute to require it, holding the requirement so basic that it is to be read into instruments creating educational trusts that are silent on the subject of race. *Triplett* v. *Trotter, supra.* Abstention in the interest of comity is equally impermissible and inappropriate, because appellant has already done its utmost to obtain an adjudication from a state court, but to no avail, and comity permits the prosecution of parallel in personam actions. *Kline* v. *Burke Construction Co.*, 260 U.S. 226 (1922). In these circumstances abstention only serves to prolong a litigation that has gone on too long already. Further, the Order of Abstention in this case departs from this Court's decision in *England* v. *Medical Examiners*, 375 U.S. 411 (1964) by requiring appellant to submit both its federal and state claims to the Virginia courts for adjudication, thereby depriving appellant of its right to a federal adjudication of its federal claims.

Abstention in this case is improper and presents substantial federal questions for other reasons as well, which require that the facts of the case be set forth in greater detail.

Factual Background

Appellant, hereinafter sometimes referred to as Sweet Briar or Sweet Briar College, is a Virginia nonstock, nonprofit corporation. It was chartered by private Act of the Virginia General Assembly on February 9, 1901, pursuant to the will of Indiana Fletcher Williams, executed April 3, 1899, and probated in the

County Court of Amherst County, Virginia on November 23, 1900. (R. 12-22). It has operated as a women's college in Amherst County, Virginia continuously since 1906 and at the time of the institution of this action had a faculty of approximately 70 persons and an enrollment of more than 700. The Williams will directed organization of the corporation to receive a devise of several thousand acres of land in Amherst County, Virginia and a substantial legacy of personal property for the establishment and operation of a school "for the education of white girls and young women." (R. 15, 16). Virginia law at the time the will was executed (as at the present time) validated trusts for racially segregated education but not for racially integrated education. (App. B, pp. 33a-35a); *Triplett* v. *Trotter, supra.*

The will of Indiana Fletcher Williams also provided that no part of "Sweet Briar Plantation and the two tracts of land adjoining" should be sold or alienated by the corporation. (R. 17). In spite of this provision in the testatrix' will, the Virginia General Assembly, by Act of February 8, 1908 (App. B, p. 38a), in order to permit sale of a portion of the real estate thus acquired by Sweet Briar from Mrs. Williams, authorized limited sales of land held by incorporated educational institutions despite any such restraint on alienation. A portion of said real estate was thereafter sold.

From 1906 until 1940 Sweet Briar College had no nonwhite students. Each year since 1940 it has had one or more nonwhite students other than Negroes despite the racial restriction contained in the will, and without objection by anyone. (R. 191).

The State Court Proceeding

On November 2, 1963, Sweet Briar's Board of Directors adopted a resolution calling for admission of students without regard to race if legally permissible, and authorized institution of proceedings to obtain a judicial determination of this question. (R. 39, 40). An appropriate judicial proceeding appeared to be an application to the Circuit Court of Amherst County, Virginia, which has authority to supervise administration of the trust, for interpretation of the racially restrictive language of the Williams will, and alternatively for application of the equitable doctrine of cy pres to permit admission of nonwhite students on the ground that changes in circumstances had rendered continuance of racial discrimination at Sweet Briar College detrimental to the central educational purpose of the will. See *William Marsh Rice Univ.* v. *Carr,* Docket No. 612,688 (Harris County, Texas, 127th Judicial District Court, March 9, 1964), *aff'd sub nom. Coffee* v. *William Marsh Rice Univ.,* 408 S.W. 2d 269 (Tex. Civ. App. 1966).

Additionally, counsel for Sweet Briar wished to urge the federal claim that appellees are prohibited by the Fourteenth Amendment from obtaining a court order requiring compliance with the testamentary racial bar. Appellees are the Virginia officers charged by statute with responsibility for enforcing the provisions of educational trusts (App. B, p. 36a), and are the only persons who might seek to enforce the racial restriction in question, because in 1901, when the Williams estate was settled, Sweet Briar obtained quit-claim deeds from all known heirs of the testatrix to all interests in the trust property. (R. 71, 78, 79). Hence appellees were made defendants in the state court suit for inter-

pretation of the restrictive clause and application of cy pres, and a declaratory judgment was requested to the effect that any state court order compelling compliance with the racial bar would violate the Fourteenth Amendment to the United States Constitution (R. 74-85).

Sweet Briar's state court proceeding met with unexpected delay. The bill of complaint was filed August 17, 1964. (R. 74). Though oral arguments were heard in December, 1964 on a demurrer filed October 14, 1964, the Amherst County court still had entered no order by April 25, 1966, when the federal action from which this appeal arises was commenced. This eighteen-month interval was consumed as follows. The demurrer sought dismissal of the bill of complaint on three grounds: (1) no case or controversy justiciable under Virginia law was disclosed; (2) no ambiguity was disclosed requiring interpretation of the racial restriction in the will; (3) no changes in circumstances had occurred sufficient to justify application of the doctrine of cy pres. (App. C, p. 39a).

The court held the demurrer under advisement for over five months, until June 3, 1965, when the judge announced in a letter to counsel that the demurrer would be sustained on all three grounds. (App. C, p. 43a). The only reference to Sweet Briar's federal contention was the "further observation" that

> the interpretation which would bring the Institute under the fourteenth amendment would certainly place it in a position, where religous [sic] training would be contrary to the Constitution, as presently misinterpretated [sic] by the Court in Washington.

(App. C, p. 43a).

Shortly after receipt of this letter, Sweet Briar's Board of Directors was faced with a new problem arising from the racial bar at the College. Pursuant to Title VI of the Civil Rights Act of 1964, which requires that all federal financial and other assistance be withheld from any institution practicing racial discrimination, the Commissioner of Education had issued regulations under which it was necessary for Sweet Briar to execute an Assurance of Compliance (Form 441) or be deprived of participation in a number of federally financed programs.[8] From 1957 through 1964, Sweet Briar had received federal aid in the following forms: a $730,000 low-interest federal loan for construction of a dormitory-dining facility, to house 150 students and feed 350 students; $64,500 in funds for scholarship loans to needy students under the National Defense Student Loan Program (in the 1963-64 academic year, such loans were held by approximately forty girls at Sweet Briar); over $14,000 in cash contributions to special projects; and participation in the Government Surplus Property Program administered by the Department of Health, Education and Welfare. (R. 46).

After considering the problem thus posed at its regular biennial meeting on June 11, 1965, the Sweet Briar Board adopted a resolution authorizing submission of the required Assurance of Compliance, together with copies of the record in the state court proceeding and the judge's letter of June 3, 1965, making clear that the Assurance was executed subject to the proceeding. (R. 64, 65). This was done, but the Assurance, thus

[8] 45 C.F.R. § 80.4 (1964).

qualified, was not acceptable to the Commissioner. (R. 48-50).

At this point a state court decree sustaining the demurrer was available to appellees for the asking. Instead, appellee McClenny filed a motion asking that the court "summarily dismiss" the proceeding because Sweet Briar "did not come into Court with clean hands or good faith," and had, prior to entry of a decree by the state court, adopted a resolution "carrying out the objectives which they sought to accomplish in their declaratory judgment," and because Sweet Briar's action "was frivolous in that after being advised of what [the] Court's judgment would be, they failed to abide by it." (R. 66). Sweet Briar was unable to obtain entry of an appealable decree sustaining the demurrer, and could not obtain a hearing on the motion until December 28, 1965, almost seven months after the June 3 letter opinion had been received.

At this hearing, appellee McClenny urged that the court hold Sweet Briar's Board of Directors in contempt because of their June 11 resolution. (R. 59). The state court again took the matter under advisement, this time for over three months. On April 6, 1966, the judge sent another letter to counsel, which reaffirmed the conclusions of the earlier letter, and concluded that the motions to summarily dismiss and to hold Sweet Briar's directors in contempt should be overruled solely on the basis of the court's finding that a racially nondiscriminatory admission policy had not in fact been implemented. (App. C, pp. 44a-46a). Otherwise the new letter opinion added nothing to the court's prior opinion. No reference was made to the federal claim.

The Federal Action

At this point twenty months, and two academic years, had been consumed in the state court proceeding, and the case still had not advanced beyond the pleading stage, nor was there yet any appealable order. It appeared that years might be required to produce a final judgment of the highest court of the state. Further, the state court's letter opinions presented Sweet Briar with a Hobson's choice of implementing a racially nondiscriminatory admission policy, and thereby subjecting itself to a charge of contempt, or permitting the state court to dispose of Sweet Briar's federal claim upon the state procedural ground of absence "of actual controversy,"[4] with the accompanying risk that federal appellate review would be foreclosed.

Each year consumed in the state court proceeding was causing faculty and student disaffection (R. 104-116), loss of federal and private financial support (R. 47, 117-126), and impairment of the quality of education at Sweet Briar. (R. 127-129). The loss of federal financial support alone was substantial. During the pendency of the state court proceeding, as of April 6, 1966, Sweet Briar had been deprived of $590,000 in federal contributions to capital improvements actually made (one-third of the construction cost of a science building and a library wing, and of remodeling costs for a language laboratory); $1,000,000 in three per cent, fifty-year loans that would have permitted construction of a much-needed student health center and a dormitory to house 200 students; and some $75,000 in federal funds and property for special projects and recurring

[4] Va. Code § 8-578 (1950).

operational needs. (R. 47). Further delay in implementing a racially nondiscriminatory admission policy could only be expected to cause additional irreparable injury of comparable magnitude.

The grounds upon which the state court's letter opinions proposed to dismiss the state court proceeding suggested an alternative course of action. Nonjusticiability under Virginia law need not preclude adjudication under federal standards; and in any event, absence of a case or controversy was a defect that could be cured by affirmatively implementing a racially nondiscriminatory admission policy. Upon these considerations, the decision was made to institute the federal action from which this appeal arises.

The complaint in the federal action, filed April 25, 1966, sought temporary and permanent injunctions restraining appellees from seeking judicial enforcement, including application for injunctive or other relief in the proceeding in the Amherst County court, of the racial restriction in controversy. (R. 8).[5] United States District Judge Thomas J. Michie entered the requested temporary restraining order the same day. (R. 92, 93).

At its regular biennial meeting on May 28, 1966, Sweet Briar's Board of Directors was advised of the federal temporary restraining order, and thereupon adopted a resolution ordering immediate implementation of the Board's racially nondiscriminatory admission policy. (R. 200). On the basis of this resolution, the Commissioner of Education accepted Sweet Briar's Assurance of Compliance, and Sweet Briar became

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[5] The complaint was amended May 31, 1966 to add a demand for declaratory judgment. (R. 100).

eligible for federal assistance. (App. A, pp. 3a, 29a-32a). Because of the continuing threat that appellees may ultimately succeed in enforcing the racial bar, however, the College has sought to minimize possible problems of restitution[6] by applying to the federal government only for scholarship loan funds for its students, under the National Defense Student Loan Program. (App. A, pp. 3a, 29a-32a). Thus economic injury to Sweet Briar continues to mount.

At the trial of the federal action, no disposition was made of appellant's motion for a preliminary injunction because of a stipulation by appellees, through counsel, that they would take no action to enforce the racial bar until a determination was made on the issues presented at that hearing. (Tr. 55). In September, 1966, while the case was under advisement, a Negro student was matriculated at Sweet Briar College. (R. 204). She is presently enrolled as a resident student there.

The Federal Claim

The claim asserted in the federal action is that section 55-29 of the Code of Virginia imposes upon appellee state officers the duty to enforce all provisions of educational trusts created pursuant to section 55-26, and that section 55-26, upon its face and as construed by the Supreme Court of Appeals of Virginia in *Triplett* v. *Trotter*, 169 Va. 440, 193 S.E. 514 (1937),

[6] Restitution of funds received under the National Defense Student Loan Program is presently being sought by the Commissioner of Education from a recipient that remains racially segregated. *In the matter of Bob Jones Univ.*, Docket No. C.R. 101, before the United States Commissioner of Education. A hearing examiner's report in that proceeding, under date of January 13, 1967, contains a recommendation that such restitution be ordered.

gives validity to trusts for racially segregated education of white persons or of colored persons, but denies validity to educational trusts for education of white and colored persons together. These statutes were in force when Indiana Fletcher Williams executed her will, providing for the establishment of Sweet Briar Institute as a school "for the education of white girls and young women." Va. Code §§ 1420, 1423 (1887); see App. B, pp. 34a-35a. Though the state has sanctioned sale of land notwithstanding the restraint upon alienation in the Williams will, and appellees have tolerated the attendance of nonwhite students other than Negroes at Sweet Briar for twenty-six years, appellees presently threaten to enforce the testamentary racial restriction because Sweet Briar's admission policy has been broadened to include Negroes. This threatened enforcement has caused, and will continue to cause, irreparable injury to Sweet Briar Institute.

The legal basis of the federal claim asserted is twofold. The threatened enforcement violates the equal protection clause of the Fourteenth Amendment and is therefore enjoinable. It also violates sections 202 through 204 and 207 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 through 2000a-3 and 2000a-6 (1964), which render illegal any attempt by any person to enforce racial discrimination at Sweet Briar College. Section 202 gives to every person the right to be free from such racial discrimination at any establishment, even though not a place of public accommodation, where such discrimination is or purports to be required by state law. Racial discrimination is and purports to be required at Sweet Briar by sections 55-26 and 55-29 of the Code of Virginia and by section 140 of the Virginia Constitution.

The Amended Complaint in State Court

The federal action and temporary restraining order stimulated three responses. First, on May 16, 1966, appellees filed a motion to dismiss the federal action, asking in the alternative that the federal court abstain from exercising jurisdiction. (R. 97). Second, on May 25, 1966, the Amherst County court finally entered its decree sustaining the demurrer in the state court action, on the grounds adopted in the two earlier letter opinions. (App. C, pp. 46a-48a). Third, the Amherst County court in its decree granted appellant leave to file an amended and supplemental bill of complaint, a copy of which had been required to be submitted in advance by the state judge. (App. C, pp. 47a-48a). On May 31, 1966, appellees filed an answer to the amended and supplemental complaint, which had not then been filed (R. 144-147); and on June 4, 1966, appellant filed an amended and supplemental complaint in state court (R. 148-161), in which appellant expressly reserved its federal claim for adjudication in the federal action. (R. 160).

Recognizing the possibility of abstention or a nonmerits dismissal of the federal action, appellant attempted to protect against these contingencies by (1) exposing its federal claim, in accordance with the doctrine of *England* v. *Medical Examiners,* 375 U.S. 411 (1964), but reserving it for adjudication in the federal action (R. 160), and (2) reserving the right to press the federal claim in state court if the federal action should be dismissed on a nonmerits ground. (R. 161).

The Decision Below

Both Sweet Briar and appellees filed pre-trial motions that purported to be dispositive of the federal action. (R. 97-99, 102, 103). The court nonetheless

scheduled the motions to be argued contemporaneously with trial on the merits, (R. 130) and the case was tried on the merits on July 6, 1966 before a three-judge court convened for that purpose. At the hearing Sweet Briar offered evidence to substantiate the allegations of the complaint. The court took the position that such evidence would be cumulative in view of a stipulation by appellees that affidavits filed in support of Sweet Briar's motion for summary judgment would be admitted in evidence. (Tr. 2-6). Appellees admitted by the stipulation that if the affiants had been called as witnesses they would have testified to the facts set forth in the affidavits. In addition, appellees admitted the genuineness of all relevant documents. (R. 139). As appellees offered no evidence, the facts in the case are undisputed, and the court below so found. (App. A, p. 29a). The court decided, with one judge dissenting, that abstention was not prohibited by section 207 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-6 (1964), because "the right to enter Sweet Briar is not a public right," and sections 202-204 of the Act, 42 U.S.C. §§ 2000a-1 through 2000a-3 (1964) refer "solely to the exercise and denial of rights possessed by the public," (App. A, p. 10a); and that abstention was called for in this case, on the following grounds:

(1) "the law does not allow the prosecution of a second suit after a concomitant suit has been decided," (*id.*, p. 4a), and "whether or not the original State decision is sufficiently final to constitute res judicata," (*id.*, p. 7a), the principle of comity requires "refusal to frustrate a State judicial determination complete for all practical purposes," (*id.*, p. 9a);

(2) "the Federal courts should not pass upon controversies primarily dependent for solution

upon local law until the State courts have ruled upon them in consideration of the Federal grounds of attack," (*id.*, p. 4a); and

(3) "only through abstention here can the college procure a complete answer to its desire for a judicial ruling upon the present vitality of the restriction," (*id.*, p. 4a).

The court's Order of Abstention stays and suspends further prosecution of the action "until the Circuit Court of Amherst County, Virginia, and the Supreme Court of Appeals of Virginia have considered and acted upon the State and Federal questions submitted, in both the original and amended complaints" in the pending state court proceeding, and provides "that this action shall be dismissed with prejudice in the event the plaintiff shall not prosecute, with reasonable promptness and diligence," the pending state court proceeding. (App. A, p. 28a). An amendatory order entered December 29, 1966 disposed of Sweet Briar's post-trial motions and expressly "reaffirms" that, under the Order of Abstention, the District Court intends Sweet Briar to have "the right to return" to the District Court "for a determination of plaintiff's claims under Federal law in the event plaintiff does not prevail in the State courts on its claims." (App. A, p. 30a).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial in that fundamental constitutional issues are raised with respect to the power of state legislatures to validate trusts for racially segregated education while denying validity to trusts for the education of white and colored persons together. This appeal also presents the question whether the threatened enforce-

ment by state officers of racial discrimination at Sweet Briar (notwithstanding the action of Sweet Briar's Board in May of 1966 ordering immediate implementation of a racially nondiscriminatory admission policy) violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and sections 202-204 and 207 of the Civil Rights Act of 1964. The constitutional issues here presented have never been put to rest by this Court, although they were discussed by Mr. Justice White in his concurring opinion in *Evans* v. *Newton*, 382 U.S. 296, 302-12 (1966).

As to these substantial constitutional issues, the District Court decided to abstain until the Circuit Court of Amherst County, Virginia, and the Supreme Court of Appeals of Virginia consider and act upon the state and federal questions presented. The court's abstention order raises further substantial federal questions as to the propriety of abstention by a federal court whose jurisdiction has been properly invoked to consider federal constitutional claims, where abstention will effectively deprive appellant of federal rights without any hope of avoiding any federal constitutional issues. This Court has previously held that abstention is not proper under such circumstances. *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Griffin* v. *School Board*, 377 U.S. 218 (1964); *England* v. *Medical Examiners*, 375 U.S. 411, 415 (1964).

"Special circumstances," *Baggett* v. *Bullitt*, *supra* at 375, establish the narrowly defined limits within which a federal district court has discretionary power to abstain. Outside those limits "it is the duty of the federal court to exercise its properly

invoked jurisdiction." *Harman* v. *Forssenius, supra* at 535 (1965). This case does not fall within any of the categories in which a federal court has discretionary power to abstain; therefore the question of abuse of discretion does not arise. Even if this were a case in which a federal court had such power, abstention would be an abuse of discretion because:

(1) without serving any useful purpose abstention requires piecemeal adjudication in many courts, multiplies the burdens of litigation and inflicts substantial irreparable injury by needlessly continuing the deprivation of Sweet Briar's federal constitutional and statutory rights;

(2) abstention will not avoid or fundamentally alter the constitutional issues raised in the litigation—issues which will ultimately have to be decided by a federal court;

(3) abstention effectively destroys a federal right asserted in this action, namely the right given by the Civil Rights Act of 1964 to be free of the attempted enforcement of racial discrimination in a state court.

A further substantial federal question here raised is whether comity is an adequate ground for postponing federal adjudication until the state courts have acted, where the federal plaintiff has sought a state court adjudication for over twenty months and the state court has refused to adjudicate upon the federal claim, first by long delay, and finally by holding it nonjusticiable under state law.

The final question raised by the abstention order is the correctness of its requirement that appellant submit its federal questions for adjudication by the

state courts. By requiring Sweet Briar to submit for adjudication by the state courts its contentions not only of state law but of federal law as well, the court below departed from the principles announced by this Court in *England* v. *Medical Examiners, supra.* The court below made this requirement in reliance upon its view that Sweet Briar will be able to return to the federal district court to litigate afresh any federal questions decided adversely by the state courts—a view also directly in conflict with this Court's decision in *England.*

A. Enforcement of statutorily required racial discrimination by appellee state officers is enjoinable.

The court below has tried this action on its merits, and has concluded that there are no disputed issues of fact requiring resolution. (App. A, p. 29a). If this Court concludes that abstention was not proper in this case, there is no obstacle to contemporaneous resolution of the merits, and there are sound reasons for which this Court should reach and decide the merits. By doing so, this Court will prevent needless protraction of a litigation already unduly prolonged, thereby eliminating unnecessary duplication of effort on the part of this Court as well as the court below, and also promptly stemming the continuing irreparable injury that Sweet Briar is undergoing, and must continue to undergo until a resolution of the merits is achieved.

The federal questions presented by the merits are substantial, and not necessarily complex. Stripped of detail, there are three such questions. First, is Virginia's statute requiring racial segregation as a condition to the validity of an educational trust violative of the Fourteenth Amendment? Because the Commonwealth of Virginia imposed racial segregation upon

Mrs. Williams' will as a condition to its validity, there is no need to speculate whether she would or would not have chosen to require racial segregation if the Commonwealth had permitted her any choice. The question is hypothetical, and becomes immaterial when the Commonwealth, "in fact, has removed that decision from the sphere of private choice." *Peterson* v. *City of Greenville,* 373 U.S. 244, 248 (1963); *accord, Robinson* v. *Florida,* 378 U.S. 153 (1964); *Gober* v. *City of Birmingham,* 373 U.S. 374 (1963); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Evans* v. *Newton,* 382 U.S. 296, 302 (1966) (White, J., concurring).

The second federal question presented by the merits is whether the same statutory requirement, alone or taken together with section 140 of the Virginia Constitution, brings Sweet Briar within the scope of section 202 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-1 (1964). This statute has never been construed by this Court, and has been construed by only one other federal court, which agreed with the dissenting judge in the instant case. *Tyson* v. *Cazes,* 238 F. Supp. 937, 943-45 (E.D. La. 1965) (*dicta*). The scope of section 202 presents a substantial federal question.

Section 202 is aimed at state segregation laws, whether or not they are enforced, that purport to require segregation or discrimination on the ground of race or color. The very existence of such laws poses a threat of possible enforcement attempts in the future —a threat to the members of the race discriminated against and a threat to the persons required by law to engage in racial discrimination—and exerts a potent influence upon the latter group to comply by discriminating against the former. As long as the state leaves on the books a law that purports to require such dis-

crimination, Section 202 pre-empts that state law not merely by restoring to private individuals the free choice to discriminate or not, but by affirmatively prohibiting the racial discrimination that the state law purports to require. In this fashion, the section encourages repeal of such patently unconstitutional state laws. A cohesive explanation of the rationale of section 202, at odds with the opinion of the court below, is provided by remarks of Senator Humphrey:

> Section 202 of title II would also prohibit discrimination or segregation in any establishment in which discrimination or segregation is required by State law or local ordinance. These laws . . . . are in patent violation of the equal-protection clause of the 14th amendment. Some of these laws, it is true, are not enforced; but any individual who violates them lives under the threat that he will be prosecuted or face the expense and burden of a lawsuit. These laws cannot be condoned and they must be repealed.
>
> Section 202 is both broader and narrower than section 201. It is broader in the sense that it is not confined to enumerated types of establishments. It is narrower because it applies only where discrimination is required by a public statute, ordinance, rule, order, and so forth. With respect to the establishments covered by such laws, section 202 in effect says that if any government is going to use race, color, religion or national origin as a basis for depriving the owners of an establishment of freedom to choose their customers, the choice that will be enforced is desegregation, not segregation. All that a State or city has to do to relieve the owners of a business of the impact of section 202 is to repeal the offending law or ordinance . . . . It can be expected that section 202 will result in the repeal of many such statutes.

110 Cong. Rec. 6534 (1964).

The third federal question presented by the merits of this case is whether, regardless of the first two questions, and even assuming that the source of the racial restriction at Sweet Briar were private rather than state action, the Fourteenth Amendment prohibits enforcement thereof by state officials. Supporting an affirmative answer are *Griffin* v. *Maryland,* 378 U.S. 130 (1964) (deputized employee of privately-owned amusement park), and *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230 (1957) (City of Philadelphia enforcing racial restriction as trustee under testamentary educational trust). The court below disinguishes the *Griffin* case, *supra,* on the ground that enforcement there was by a state deputy sheriff, while in this case it is by a state's Attorney General and its Commonwealth Attorney. (App. A, p. 11a). Appellant submits that this distinction is unsound, and that the proper resolution of this question is set forth in Judge Butzner's dissenting opinion. (App. A, pp. 23a, 24a). Indeed, this case combines the unconstitutional state action involved in *Griffin* with that in the *Peterson* case, *supra,* just as though *Griffin* had involved a Maryland statute prohibiting operation of racially integrated private amusement parks in addition to enforcement of the racial bar by state police officers.

B. Abstention is not proper in this case, and is prohibited by the Civil Rights Act of 1964.

The "paramount ground for abstention" in this case, according to the court below, "is that the resolution of conflicting views under the State law is the exclusive province of the State courts until a Constitutional question develops." (App. A, p. 9a). But in this case federal constitutional and statutory questions have already developed and are unavoidably presented. The suggested "paramount ground" for abstention is un-

available to support the judgment below for three reasons. First, the Virginia statute under attack on federal constitutional grounds is unambiguous in requiring racial segregation, and has been authoritatively construed to this effect by the Supreme Court of Appeals of Virginia. Second, the federal questions cannot be eliminated or fundamentally altered by resolution of any questions of state law. Third, Congress has prohibited abstention and given Sweet Briar the right to be free from all attempts to enforce the racial restriction.

(1) *The state statute attacked is unambiguous.*— Section 55-26 of the Virginia Code (1950) does not provide an occasion for abstention because its racial segregation requirement is not unclear and has already been authoritatively construed by the Supreme Court of Appeals of Virginia. The abstention doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). Otherwise, "it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.*, at 535.

The separate clauses by which section 55-26 authorizes education trusts for the white and for the colored, and the different effective dates of validation, eliminate any ambiguity as to the statute's requirement that an education trust in Virginia must, as a condition to validity, be either one for white people only or one for colored people only. If there were ambiguity on the face of the statute, its history would quickly allay any doubt that racial segregation was intended. The statute was originally enacted in 1839, against the background of *Literary Fund* v. *Dawson*, 37 Va. (10 Leigh) 147 (1839), which held an educational trust invalid in the absence of statutory authori-

zation because Virginia had repealed the Statute of Charitable Uses, 43 Eliz., c. 4, by Virginia Act of December 19, 1792, c. 79. (App. B, p. 32a-33a). Under the regime of slavery then existing, the new 1839 statute originally authorized educational trusts only for schools for the education of free white persons. Virginia Act of April 2, 1839, c. 12, § 1 (App. B, p. 33a). When the clause authorizing trusts for the education of colored persons was added in 1873, the Virginia General Assembly could easily have merely deleted the qualifying words "free" and "white" if it had wished to authorize educational trusts for integrated education, instead of adding a separate clause, with a different effective date, separately to authorize trusts for the education of colored persons, as it did. Virginia Act of March 28, 1873, c. 263, (App. B, p. 34a). That racially integrated educational trusts were not authorized by the 1873 amendment is further demonstrated by contemporaneous legislation in 1870 outlawing racially integrated education in schools in Virginia, Act of July 11, 1870, c. 259, p. 413. Compare *McCain* v. *Davis,* 217 F. Supp. 661, 665 (E.D. La. 1963).

Any possible question as to the meaning of the statute is foreclosed by the decision of the Supreme Court of Appeals of Virginia in *Triplett* v. *Trotter,* 169 Va. 440, 193 S.E. 514 (1937), that the racial segregation requirement of section 55-26 must be read into wills providing for educational trusts even in the absence of any testamentary language mentioning race.

Even if there were any possibility that the Supreme Court of Appeals of Virginia might now overrule *Triplett,* such a slender possibility would not be sufficient to justify federal abstention. A substantial and open question as to the meaning of the state statute under attack is required. *Harman* v. *Forssenius, su-*

pra; Davis v. *Mann,* 377 U.S. 678, 690 (1964); *Baggett* v. *Bullitt, supra* at 375-79; *McNeese* v. *Board of Education,* 373 U.S. 668, 673-74 (1963); *United Gas Pipe Line Co.* v. *Ideal Cement Co.,* 369 U.S. 134, 135-36 (1962); *Chicago* v. *Atchison, T. & S.F.R. Co.,* 357 U.S. 77, 84 (1958); *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U.S. 101, 105 (1944).

(2) *The federal questions cannot be avoided by abstention.*—The federal questions cannot be eliminated or fundamentally altered by resolution of any questions of state law because, however these questions might be resolved, state law authorizes and requires appellee state officers to enforce the racial restriction in question as a testamentary provision of an educational trust. Enforcement of racial discrimination by state officers raises federal constitutional questions whether the discrimination is of state or private origin.

The majority opinion of the court below, in enumerating questions that Sweet Briar is required to submit to the Virginia courts for decision, lists only three potential questions of state law. (App. A, pp. 11a, 12a).[7] Foremost of these is whether section 55-26 of the Virginia Code requires racial segregation as a condition to the validity of educational trusts in Virginia. If this question is answered in the affirmative (as it already has been by Virginia's highest court) Sweet Briar is entitled to relief on federal grounds. If the question were to be answered in the negative, the federal court would still have to decide the broader federal question, which is whether Virginia state officers may constitutionally be charged with the duty of enforcing even a privately authored racial restriction. Decisions of this Court in other contexts hold this may not constitutionally be done. *Griffin* v. *Maryland,* 378 U.S. 130

[7] Of the six questions enumerated in the opinion of the court below, those numbered 1, 3, and 6 are clearly federal questions.

(1964); *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957). The applicability of these decisions to appellees in this case is a constitutional question that cannot be avoided even by a reinterpretation of section 55-26 of the Virginia Code.

Nor can this federal question be avoided by any resolution of the second question of state law mentioned by the court below—whether section 140 of the Virginia Constitution applies to private as well as public schools. Both of these state law questions are material in this case only because they supply additional elements of state action violating the Fourteenth Amendment and fastened upon by section 202 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-1 (1964). But state action is present in any case because statutorily required enforcement by state officers of even private racial discrimination is state action.

The element of state action is also present without regard to questions of state law because of the impact that the predecessor to section 55-26 (Va. Code § 1420 (1887), see App. B, pp. 34a, 35a), on its face giving validity only to racially segregated educational trusts, had in 1899, when the will in question was written. Whatever the Virginia courts might say of the statute today, it exerted its force then as a clear warning that racial segregation was the only way to assure the validity of an educational trust. No pronouncements of law by Virginia courts in 1967 or 1970 can eradicate the fact of that warning, or restore the freedom of choice that Virginia denied Mrs. Williams when she wrote and executed her will in 1899.

The third question of state law designated by the court below for submission to the Virginia courts is one that cannot be reached until the federal questions

presented have been decided, and therefore provides no basis for abstaining from deciding the federal questions at this time. It is:

> Whether, *if the racial clause of the Williams will is held inoperative,* the trust fails entirely; or can be terminated by the Virginia legislature under section 55-34 of the Code of Virginia, 1950; or is subject to the application of the cy pres doctrine under section 55-31 of the Code; or some other disposition is proper . . . .

(App. A, pp. 11a, 12a; emphasis added). Since this question cannot be reached until the federal constitutional questions are decided, the effect of abstention for the purpose of obtaining an authoritative answer to the question is to require Sweet Briar to submit its federal questions to the state courts for adjudication, in violation of the rule of *England* v. *Medical Examiners,* 375 U.S. 411 (1964).

Nor is abstention proper on any theory that federal questions might be avoided by state court application of cy pres to the Williams trust independent of invalidation of the racial segregation requirement on federal grounds. Possible application of cy pres, a doctrine of discretion, is not the kind of state law question that justifies abstention. See *Baggett* v. *Bullitt, supra* at 375-79. The only clear-cut question is the meaning of section 55-26, which is already established. Abstention in deference to possible application of cy pres would tolerate enforcement of the unconstitutional statute, in hopes that the state courts might in the exercise of discretion find some way to give as a matter of grace the relief to which Sweet Briar is entitled as a matter of constitutional right.

In any case it is obvious that a Virginia court will not apply the cy pres doctrine so as to permit the opera-

tion of Sweet Briar as a racially integrated institution in violation of the provisions of section 55-26 of the Virginia Code (1950). Section 55-31, the Virginia provision for cy pres, was enacted in 1946.[8] It does not authorize Virginia courts to transform trusts for valid purposes into trusts for purposes not authorized by section 55-26 of the Code.

A further federal question presented regardless of how state law questions might be resolved is whether sections 202-204 and 207 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 through 2000a-3 and 2000a-6 (1964), entitle Sweet Briar to injunctive relief. Sweet Briar is entitled to relief on this federal ground if any state law purports to require racial discrimination at Sweet Briar College. This federal question cannot be altered by restrictive interpretations of state law at the hands of the Supreme Court of Appeals of Virginia. If section 55-26 of the Virginia Code (1950), or section 140 of the Virginia Constitution, purports to require that Sweet Briar exclude persons on the basis of race, section 202 creates a right to be free from such racial discrimination. This is so even if the law purporting to require racial discrimination is interpreted by state courts not to require it in fact. The purpose of the section is to reach situations "in which there is 'on the books' a State or local law requiring discrimination." 110 Cong. Rec. 1525 (1964). The Civil Rights Act of 1964 is not satisfied by a state court's narrowing interpretation of such a statute; repeal is the objective, and federally imposed nondiscrimination is the means utilized to pursue it. See Remarks by Senator Humphrey, 110 Cong. Rec. 6534 (1964), quoted *supra,* p. 24. State legislative action—not merely

[8] Va. Act of March 15, 1946, c. 187, pp. 294-95.

state judicial action—is required to eliminate the federal question raised by section 202.

(3) *Abstention is prohibited by the Civil Rights Act of 1964.*—Sweet Briar continues to suffer irreparable injury month after month because abstention prolongs uncertainty as to what its ultimate racial policy will be, and hence whether it will be a viable educational institution, eligible for federal assistance, worthy of private financial support, and attractive to members of the teaching profession and to students. Congress has seen fit to protect institutions such as Sweet Briar from this kind of injury by enacting Sections 202-204 and 207 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 through 2000a-3 and 2000a-6 (1964). Section 202 prohibits racial discrimination at any establishment or place where state law requires or purports to require it, whether or not the establishment or place is public, or is a place of public accommodation under section 201 of the Act, 42 U.S.C. § 2000a (1964). Section 203 provides for institutions such as Sweet Briar the greatest possible insulation from any and all pressure to abide by unconstitutional state-imposed racial discrimination. It prohibits all attempts to enforce such discrimination, including threats of contempt sanctions and judicial enforcement proceedings in state court. Any such attempt "is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964." *Georgia* v. *Rachel,* 384 U.S. 780, 805 (1966). Section 204 authorizes the injunctive remedy, and section 207 commands that jurisdiction be exercised "without regard to whether the aggrieved party shall have exhausted any administrative or other remedy."

The court below concluded, on the basis of section 201(e) of the Act, 42 U.S.C. § 2000a(e) (1964), that

section 202 does not cover Sweet Briar because Sweet Briar is not a public institution. (App. A, p. 10a). Judge Butzner disagreed. (App. A, pp. 26a, 27a). The question has never been presented to this Court. Thus the court below has adversely decided one federal question that could dispose of the merits of this entire case in Sweet Briar's favor. On this point alone, this appeal presents a substantial federal question. That the court below decided it in reaching its decision to abstain demonstrates the unsoundness of abstention in this case as a matter of judicial administration.

C. Neither res judicata nor comity justifies abstention in this case.

One ground upon which the court below based its decision to abstain concerns the suit pending in the Circuit Court of Amherst County, Virginia. The state court's interlocutory decree sustaining a demurrer is held to be res judicata, or in any event "a State judicial determination" of Sweet Briar's federal claim that is "complete for all practical purposes," which a federal court, for reasons of comity, should not frustrate. (App. A, p. 9a). But the state court's interlocutory decree is not res judicata, nor a judicial determination "complete for all practical purposes," because it is not final, it is not a judgment on the merits or with prejudice as to Sweet Briar's federal claim, and it does not adjudicate any issue dispositive of that claim. By abstaining on the basis of this nonfinal, nonmerits decree, the court below has departed from this Court's doctrine laid down in *Kline* v. *Burke Construction Co.*, 260 U.S. 226 (1922), and in so doing has foreclosed the only avenue to federal adjudication of federal

claims which a state court has refused to adjudicate upon the state procedural ground of nonjusticiability.

(1) *The state court decree is not res judicata.*—If the Circuit Court of Amherst County had entered a final decree rejecting Sweet Briar's federal claim upon the merits, or adjudicating adversely to Sweet Briar an issue that is dispositive of Sweet Briar's federal claim, such a decree would bar prosecution of the federal action. It did neither of these. The interlocutory decree of May 25, 1966 did three things:

(a) It overruled the motion of appellee McClenny to summarily dismiss the case. (App. C, p. 47a).

(b) It sustained the demurrer of appellee McClenny to complainant's bill upon the grounds set forth in the demurrer, which do not reach the merits of the federal claim. (App. C, p. 47a).

(c) It granted Sweet Briar leave to file an amended and supplemental bill of complaint. (App. C, pp. 47a, 48a).

The interlocutory decree entered in the state court proceeding is not res judicata in this action because it is not final. *G. & C. Merriam Co.* v. *Saalfield,* 241 U.S. 22, 28 (1916); *Bibber* v. *McCreary,* 194 Va. 394, 395, 73 S.E. 2d 382, 383 (1952); *Gillespie* v. *Coleman,* 98 Va. 276, 36 S.E. 377 (1900); *London-Virginia Mining Co.* v. *Moore,* 98 Va. 256, 35 S.E. 722 (1900); Restatement, Judgments, § 41, comment e (1942). The Supreme Court of Appeals of Virginia, in the *London* case, *supra,* stated that:

> an order sustaining a demurrer to a bill, and giving the plaintiff leave to amend in a specified time, cannot be regarded as a final order, or as settling

> the principles of the cause, until after the time limited therein for the plaintiff to amend his bill has expired.

98 Va. at 256, 35 S.E. at 723.

Even if it were final, the state court's decree sustaining the demurrer would not be res judicata in this action because it is not a judgment on the merits or with prejudice as to the federal claim asserted in this action. The only grounds considered by the state court, or that it was free to consider, were those "specifically stated in the demurrer." Va. Code § 8-99 (Supp. 1954); *Virginia & Sw. Ry.* v. *Hollingsworth,* 107 Va. 359, 363-64, 58 S.E. 572, 573 (1907). The grounds upon which the demurrer was sustained do not reach the federal claim at all. The state court: (1) refused to reach or consider the federal constitutional claim on the ground that there was no justiciable controversy under state law (App. C, pp. 41a, 42a); (2) rejected the state cause of action for interpretation of the will on the ground that "there is no ambiguity in the Terms of the Will of Indiana Fletcher Williams," (App. C, p. 42a); and (3) rejected the state cause of action for application of cy pres on the ground that the trust "has been in operation for more than sixty years, very successfully so." (App. C, p. 43a). The Amherst County court did not adjudicate upon the merits of Sweet Briar's federal claim and its decree would not have been with prejudice even had it been final. Thus the decree cannot be conclusive in this action. *Smith* v. *McNeal,* 109 U.S. 426 (1883).

The state court's decree has no collateral estoppel effect in the federal action not only because it is not final, but for the further reason that it adjudicated only the three issues enumerated above, none of which

is dispositive of the federal claim asserted in this action. *United Shoe Machinery Corp.* v. *United States,* 258 U.S. 451, 459 (1922); *Russell* v. *Place,* 94 U.S. 606, 608-09 (1877); *Cromwell* v. *County of Sac,* 94 U.S. 351 (1877); *Winborne* v. *Doyle,* 190 Va. 867, 59 S.E. 2d 90 (1950); *Capps* v. *Whitson,* 157 Va. 46, 50, 160 S.E. 71, 72 (1931); 1B Moore, Federal Practice ¶¶ 0.443[3]-[4], at 3909-11, 3913-17 (2d ed. 1965).

(2) *Comity does not justify abstention in this case.*— The Amherst County court required twenty-one months and the pressure of the federal action to produce even a nonmerits, nonfinal, nonreviewable, and therefore nonconclusive, interlocutory decree in the state court proceeding, and the case presently remains in the pleading stage. This is far from "a State judicial determination complete for all practical purposes," (App. A, p. 9a); it is rather a state judicial frustration of Sweet Briar's federal claim, first by lengthy postponement of any reviewable decree at all, then by refusal to meet the federal claim for lack of "actual controversy," Va. Code § 8-578 (1950), coupled with the threat of contempt sanctions if Sweet Briar's Board of Directors should take the necessary steps to bring such a controversy into being. (App. C, p. 45a). Sweet Briar is seeking not an encore, but a single day in court on its federal claim.

Abstention on the basis of the state court's interlocutory, nonmerits decree violates the doctrine of *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922), that comity permits the pendency of parallel in personam actions between the same parties in state and federal courts until one of them proceeds to a final judgment on the merits that may properly be pleaded as res judicata in the other. Because res judicata prevents

jurisdictional conflicts, neither action interferes with the jurisdiction of the other court.

Departure from the *Kline* doctrine in this case penalizes Sweet Briar for having sought relief in the state courts by holding that Sweet Briar's right to seek relief in a federal action is thereby foreclosed, even though the state court's refusal to adjudicate the federal claim forecloses review in this Court, without any procedural default by Sweet Briar, by finding the federal claim beyond the cognizance of state courts on procedural grounds. During the twenty-one months that Sweet Briar was cut off from any review at all by the state court's failure to enter a decree, the College's hands were tied, and irreparable injury by deprivation of its federal rights continued to mount. When finally entered, the decree sustained the demurrer on grounds that would foreclose ultimate review by this Court, since the federal claim was not rejected, but instead avoided, solely on the state procedural ground of nonjusticiability. The *Kline* doctrine is functional, not merely technical. The same aspect of the decree that deprived it of finality for purposes of res judicata—its failure to dismiss the case—also insulated it from review, *Bibber* v. *McCreary,* 194 Va. 394, 73 S.E. 2d 382 (1952), and delayed the possibility of ultimate review by this Court. See 1B Moore, Federal Practice ¶ 0.416[3], at 2251 (2d ed. 1965). The same feature of the decree that prevents it from being with prejudice to Sweet Briar's federal claim—its failure to reach the merits, *Smith* v. *McNeal,* 109 U.S. 426 (1883)—also insulates it from review by this Court. Under the doctrine of the *Kline* case, an alternative avenue to federal adjudication of federal claims is preserved. Departure from *Kline* by the court below forecloses this avenue.

The penalty that abstention imposes upon Sweet Briar for resorting initially to its own state court is also unwise as a matter of policy. The rule applied below will disturb the delicate balance of state and federal jurisdiction by guiding into federal courts many litigants who otherwise might seek relief initially in state courts primarily on local law grounds. It is one thing to go to state court forewarned that res judicata may prevent later renewal of an adversely decided claim, limiting the plaintiff to review of properly preserved federal questions in this Court. It is quite another to do the same thing when faced with the warning that, without any procedural default on plaintiff's part, the state court may nonetheless prevent any federal review at all by refusing to reach and decide the federal claim on procedural grounds, and that in such a case neither review in this Court nor a new action in a federal district court will be be available. This is the warning posted by the decision below.

Abstention on the ground of comity in these circumstances violates the principle of *England* v. *Medical Examiners,* 375 U.S. 411 (1964). There this Court made it quite clear that when a plaintiff is required to go to the state court for the purpose of resolving an open question of state law, his right to a federal adjudication upon his federal claim is not foreclosed unless he intentionally waives it by submitting the federal claim for final adjudication in the state court.

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. . . . Nor does anything

> in the abstention doctrine require or support such a result. . . .
>
> . . . [Review in this Court] is an inadequate substitute for the initial District Court determination—often by three judges, 28 U.S.C. § 2281—to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. . . .

375 U.S. at 415-16.

This right is no less valuable when a plaintiff resorts initially to state court than when difficult, open questions of state law lead a federal court to require that he do so. The right to federal adjudication is no more waived by resort to a state court which refuses to reach the federal claim on grounds of nonjusticiability under state law than it would be if the federal claim had never been submitted to the state court at all. If Sweet Briar had refused to amend its bill of complaint, and the case had been dismissed, the decree of dismissal would not have barred the federal action. That Sweet Briar chose the course of caution, and filed an amended complaint, does not change this result.

A third ground relied upon by the court below is that the federal court "at best . . . could only rule that the *State authorities* may not enforce the racial proviso—a narrow, negative disposition," (App. A, p. 12a; emphasis in original); and that the racial restriction's "viability would not thereby be laid to rest" because

> any person in interest, such as a donor to the college, a minority member of the board of directors,

> or possibly others, it would seem, could still question the recent action of the college as ultra vires the corporation or the board, or in violation of the trust clause of the will.

(*ibid.;* footnote omitted.)

The short answer to this point is that appellee state officers are the only persons presently threatening to enforce the racial restriction, and are the only defendants in the state court proceeding as well as in the federal action. Since Sweet Briar purchased all interests of legal heirs of Mrs. Williams when her estate was settled, and the present members of the Board are unanimous in the adoption of Sweet Briar's racially nondiscriminatory admission policy, there is no present threat from those quarters. Only the state authorities will be bound by any decision, whether rendered by a state or a federal court. The only relief Sweet Briar seeks in the federal action is relief that the court below is competent to give.

D. The district court erred in requiring that federal questions be submitted for adjudication by the Virginia courts.

Even if abstention were proper in this case, the judgment of the court below would require modification because it departs from this Court's clear holding in *England* v. *Medical Examiners,* 375 U.S. 411 (1964), by requiring that Sweet Briar submit its federal contentions for full adjudication by the Virginia courts, while retaining jurisdiction on the theory that Sweet Briar will be entitled to return to the court below for relitigation of federal questions decided adversely to Sweet Briar by the Supreme Court of Appeals of Virginia. The court below holds that when a

> Constitutional question develops . . . even then the question *must first* be left to the State courts to

> consider and decide it "in light of the constitutional objections presented to the [Federal court]". Government Employees v. Windsor, 353 U.S. [364,] 365, 366 (1957). . . . In *Windsor* the decision was reversed because the complainant had not submitted the Federal issues to the State court.

(App. A, p. 9a; emphasis in original).

But this Court expressly clarified *Windsor* in *England, supra,* at 419-20:

> The case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed "in the light of" those claims.

Having concluded that "the plaintiff must 'expose', as it says,[9] the restriction and the prohibitions to the State court under the focus of the Federal strictures upon them," (App. A, p. 11a), the court below designated the following federal questions of law and fact that "seemingly need to be answered by the State court in the light of the Federal Constitution":

> 1. Whether a will made more than fifty years before the Supreme Court's racial decisions were rendered should be affected by these subsequent enunciations;
>
> . . . .
>
> 3. Whether the testatrix included the racial stipulation in 1899 by reason of the existence of

[9] This use of the word "expose" is not original with appellant. This Court stated in *England* that a party "may inform the state courts that he is *exposing* his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." 375 U.S. at 421 (emphasis added).

> the Virginia statute or because of her own volition. . . .
>
> . . . .
>
> 6. Whether the Virginia statutes pertaining to the conferring of academic degrees; exemption of property from condemnation and taxation; police protection; power of the State to abrogate the trust; and other subjects related to educational institutions, imbue Sweet Briar with a State character, as its brief suggests.

(App. A, pp. 11a, 12a).

A further question that the court below requires Sweet Briar to submit for state court adjudication is one that cannot be so submitted without submitting Sweet Briar's federal claim as well: the continued vitality of the racial segregation requirement of section 55-26 of the Code of Virginia (1950), recognized as a condition to the validity of educational trusts in *Triplett* v. *Trotter,* 169 Va. 440, 193 S.E. 514 (1937). Although this is a question of state law, its decision would not be material to any claim for relief under state law, but only to the decision of Sweet Briar's federal constitutional and statutory claims. This case is unlike *England* and the entire line of cases in which abstention to permit state court determination of the meaning of a state statute has been approved, see *Baggett* v. *Bullitt,* 377 U.S. 360, 376-78 (1964), because in those cases a restrictive interpretation of the state statute, holding it inapplicable to the plaintiff, would entitle the plaintiff to relief under state law, thus avoiding all questions as to the statute's validity under the federal Constitution. Here this is not the case. A restrictive reinterpretation of section 55-26, reading the racial segregation requirement out of the statute, would afford

Sweet Briar no relief under state law, for the racial restriction in the Williams will would remain unaffected and enforceable insofar as state law is concerned. Thus submission of this state law question to the state courts would be no more than a request for an advisory opinion unless Sweet Briar's federal constitutional claim were also submitted for adjudication. Virginia courts are not empowered to render advisory opinions. *City of Fairfax* v. *Shanklin,* 205 Va. 227, 229, 135 S.E. 2d 773, 775-76 (1964); *Patterson's Ex'rs* v. *Patterson,* 144 Va. 113, 120, 131 S.E. 217, 219 (1926).

If Sweet Briar complies with the Order of Abstention as it stands, the England decision will preclude return to the federal district court, despite the assurance of the court below that this is not the case. (App. A, p. 30a). If Sweet Briar should attempt to rely upon this assurance, and fail to seek direct review in this Court of a decision by the Supreme Court of Appeals of Virginia after litigating the federal questions in state court, the College would be deprived of any federal adjudication whatsoever upon its federal claim. The Order of Abstention is thus tantamount to dismissal. Even if abstention is proper in this case, a substantial federal question is presented by the failure of the court below to follow the rule laid down in the *England* case.

CONCLUSION

This Court has jurisdiction on direct appeal to review the Order of Abstention entered in this action December 7, 1966, and this appeal presents substantial federal questions that require plenary consideration. The judgment from which this appeal is taken should be reversed, and this Court should direct that the in-

junctive and declaratory relief demanded in the complaint be granted. Alternatively, the judgment appealed from should be reversed and the case remanded for an adjudication on the merits of the federal claim. In the further alternative, if the judgment appealed from is not reversed, it should be modified to require submission to the Virginia courts only of the claims under state law, in the light of Sweet Briar's federal contentions, rather than submission of federal as well as state law questions for adjudication by the Virginia courts. Counsel for Sweet Briar respectfully request that this Court note probable jurisdiction and, because of the continuing nature of Sweet Briar's injury, order the case set for argument at the earliest possible time.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT CHARLOTTESVILLE

CIVIL ACTION No. 66-C-10-L

SWEET BRIAR INSTITUTE, *Plaintiff*,

v.

ROBERT Y. BUTTON,
Attorney General for the
Commonwealth of Virginia, et. al., Defendants.

(Argued July 6, 1966. Decided December 2, 1966)

Before BRYAN, *Circuit Judge*, and MICHIE and BUTZNER, *District Judges*.

FRANK G. DAVIDSON, JR., Lynchburg, Virginia and THOMAS S. CURRIER, Charlottesville, Virginia, counsel for plaintiff.

ROBERT Y. BUTTON, *Attorney General of Virginia*, Richmond, Virginia, and WILLIAM M. MCCLENNY, *Commonwealth's Attorney*, Amherst County, Virginia, counsel for defendants.

ALBERT V. BRYAN, Circuit Judge:

A racial restriction limiting the students who could be admitted to Sweet Briar College, Virginia, to "white girls and young women" was imposed by the will of Indiana Fletcher Williams which created the trust whereby the institution was established and has been operated since 1906. The college, now chartered by Virginia as a non-stock, non-profit corporation and as such a testamentary trustee, brought this suit to have enforcement of the restriction enjoined and the stipulation declared unlawful.

To this end the complaint alleges invalidity in the restriction on the ground that it offends the equal protection clause of the Fourteenth Amendment; the Civil Rights

Act of 1964, 42 USC 2000a-1 through 2000a-6; and the recent pronouncements of the United States Supreme Court outlawing invidious racial or color distinctions. Further allegations aver serious detriment to the college, both economic and educational, by reason of the racial stipulation.

Defendants to the complaint are the Commonwealth's Attorney of Amherst County, in which the college is located, and the Attorney General of Virginia. They are charged by law with the enforcement of the terms of charitable trusts existing in the State, such as that embodying Sweet Briar College. The complaint prays injunction of these officers from prosecuting any suit to effectuate the restriction.

The Williams will, dated April 3, 1899, was duly probated in Virginia in 1901. It directed the organization of a corporation to receive a devise of large tracts of land and a generous legacy of moneys, constituting the trust estate, as follows:

> "The said corporation shall be formed with the object and with the power of establishing and maintaining within the State of Virginia, a school or seminary for the education of white girls and young women. . . .
>
> "2. Immediately upon the formation and organization of such corporation, the said trustees [under the will] shall grant and convey, and I hereby give and devise, the said . . . property . . . to the said corporation, to have and to hold the same unto it, and its successors forever, upon the conditions and for the purposes hereinafter declared, which it shall accept and assume, namely: the said corporation shall with suitable dispatch establish and shall maintain and carry on upon the said plantation a school or seminary, to be known as the 'Sweet Briar Institute', for the education of *white girls and young women.* It

> shall be the general scope and object of the school to impart to its students such education in sound learning, and such physical, moral and religious training as shall in the judgment of the directors best fit them to be useful members of society. . . ." (Accent added.)

These provisions were carried into the corporate charter.

Before the commencement of this suit the directors of the college adopted resolutions proposing the acceptance of students without reference to race. After submission of the case to the court, Sweet Briar put this policy into effect by matriculating a Negro applicant. It also accepted Federal grants of moneys in the way of scholarships and other aid which are granted only to colleges not maintaining segregation by race or color.

The college's attack, mounted on the Fourteenth Amendment, is pointed at the racial restriction as one permitted and compelled by State action, in that in both aspects it is predicated on the immanent proscriptions of section 55-26, Code of Virginia of 1950. This statute and its predecessors validate charitable trusts for education, which were not permitted prior to this legislative approval. The highest court of Virginia construed this law, in Triplett v. Trotter, 169 Va. 440, 193 SE 514 (1937), to mean that an institution so created cannot admit both white and Negro students, but its admissions must be limited exclusively to one or the other race. Another target of attack on the same ground is section 140 of the Virginia Constitution forbidding the education of white and Negro scholars in the same school.

Plaintiff avers that the defendant State officials threaten to employ these racial prohibitions to force Sweet Briar to adhere to the will's racial restriction. The college also alleges that the Civil Rights Act of 1964, sections 202 and 203, 42 USC 2000a-1 and 2, precludes the requirement of racial discrimination.

Two years prior to the April 1966 commencement of this suit, the college filed an action against the same defendants in the Circuit Court for Amherst County, asking for judicial guidance of the plaintiff in the administration of its trust when facing both the restriction and its alleged detriment to the success of the college and its ability to achieve the aims of the will. There the plaintiff also attacked the restriction as violative of the Fourteenth Amendment.

At the time the present suit—the Federal case—was begun, the Circuit Court Judge had announced that he would dismiss the case before him because he found no occasion for the suit. The decree followed. However, he allowed the college to amend its complaint, and the cause now stands for hearing on the amendment.

Relying upon the plaintiffs' [sic] election to proceed first in the State court, the present pendency of that case and the decision rendered therein, the defendant officials moved for dismissal of the Federal suit, or for abstention here from further proceedings until the college had carried its case through the State courts, trial and appellate. After considering the record and the arguments of counsel, on brief and orally, we have decided to abstain.

This course is dictated *first* because the law does not allow the prosecution of a second suit after a concomitant suit has been decided. *Next,* it is dictated by the established principle that the Federal courts should not pass upon controversies primarily dependent for solution upon local law until the State courts have ruled upon them in consideration of the Federal grounds of attack. *Thirdly,* only through abstention here can the college procure a complete answer to its desire for a judicial ruling upon the present vitality of the restriction.

I. Precedent permits the pendency of two contemporaneous in personam actions between the same parties, one in the State and one in the Federal court, but an adjudica-

tion of the same issue in one of them automatically bars the other as res judicata. That Sweet Briar's State suit has already presented the same issues as are tendered now is plain. This is acknowledged by the college in excepting to the State decision on the ground that the State court had not passed on the Federal questions raised in the suit. Particularly, both suits pleaded the Fourteenth Amendment and both were submitted while the Civil Rights Act was in the comprehension of the court and counsel. The State court decision in effect upholding the racial restriction, was announced almost a year before the Federal suit was filed.

A justification urged for maintenance of the Federal suit is the asserted delay of the State judge in entering a formal decree implementing his decision. However, the necessary order was entered at about the same time as the Federal case was instituted. Moreover, we have no jurisdiction to police a State court in setting down its pronouncements. The remedy for unreasonable delay, if any there be, is well within the powers of the State judiciary.

It is almost cavil to attempt to justify the Federal suit on the assertion that the State court refused or failed to decide the Federal questions. They were all noted, even if not discussed, by the State judge, and the case tendering them was held to be without merit. Right or wrong it was an unequivocal denial of the Federal claims. A direction for dismissal of a complaint is just about the most explicit and definitive determination of the claims therein as is conceivable.

A contrary conclusion cannot succeed because of the absence from the demurrer on which the State court decided the controversy, of a specific mention of either the Federal Constitution or the Civil Rights Act. In Virginia, as elsewhere generally, a ruling sustaining a demurrer, save when raising only a procedural point, is a decision on the merits. It precludes relitigation of the

disputed matters. Not only that, it is conclusive upon any contention which *could have been urged by the plaintiff although it was not.* The basis of this rule is quite understandable—it prevents vexation of a defendant through repeated trials. The principle was clearly enunciated in Griffin v. Griffin, 183 Va. 443, 32 SE2d 700, 702 (1945), the Court saying:

> "When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter not only as to every question which was decided, *but also as to every other matter which the parties might have litigated and had determined,* within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.' 4 A.L.R. 1174, note. A general demurrer which denies the right of the plaintiff to recover on the cause of action alleged, which is sustained, is a decision on the merits. . . ." (Accent added.)

This doctrine was expounded, too, in Tomiyasu v. Golden, 358 F2d 651, 653 (9 Cir. March 1966) in these words:

> "Appellants' contention that a federal right has been violated rests on the allegation that the Nevada statute providing for foreclosure sales under deeds of trusts, as applied to appellants, deprived them of their property without notice and a fair hearing. This is precisely the basis upon which recovery was sought under state law in the state courts. By merely failing to raise the constitutional issue in the state action, appellants could not preserve for themselves the right to enter a federal court at a later date upon the same facts,

> alleging the same wrong, and seeking the same recovery, simply because they present a new theory of relief based upon the Constitution. . . . If appellants have had one chance to litigate the issues they now raise here, they have had the process which the state owes them and the Constitution secures to them."

Support for this view was found by the Ninth Circuit in Angel v. Bullington, 330 US 183, 188-89 (1947).

The allowance of the college's amendment did not destroy the res judicata effect of the State court's decision *in respect to the Federal cause.* Restatement of Judgments, § 41, Comment (d), p. 163. The decree of the Amherst Circuit Court unequivocally dismissed the case. Leave to amend is no more than the consent of the court to hear further argument; it does not ipso facto suspend the decision embedded in the decree. The resolution of the case remains as stated until the decree is vacated. Actually, the amended bill here introduced no ground of argument not available to the college from the beginning, including § 55-26, Code of Virginia, and the Civil Rights Act of 1964. But whether or not the original State decision is sufficiently final to constitute res judicata, the fact is that the State case was the first to go to decision, and on reaching that stage it should preclude the further prosecution of the Federal case, at least until carried through the State court of last resort.

Dismissal Warranted

Under England v. Medical Examiners, 375 US 411 (1964) we could dismiss the case. Save for appellants' misunderstanding there, of the holding in Government Employees v. Windsor, 353 US 364 (1957) the Court stated that the Federal suit would have been dismissed, once the State court had taken the case and decided it in its entirety. Although cited by plaintiff to sustain its procedure, the plaintiff's course here is diametrically opposed to that ap-

proved in England. There the suit was commenced in the Federal court but remitted by that court to the State court. Here the plaintiff has done just the reverse, a maneuver sharply disapproved by the Supreme Court. Apt here is this part of the *England* opinion:

> "But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in *Button* [N.A.A.C.P. v. Button, 371 US 415 (1963)], where we stated that a party elects to forgo his right to return to the District Court by a decision 'to seek a complete and final adjudication of his rights in the state courts.' We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court."

375 US at 418-19.

Obviously, then, the plaintiff is not entitled to proceed now in the Federal court. Indeed, we think *England* almost compels dismissal. However, to avoid the possibility of injury to the plaintiff, we prefer to defer final disposition of this case until plaintiff's claims have been put before the State courts completely.

II. Because the State courts had already advanced to a full determination of all the issues, comity between the Federal and State judiciaries forcefully directs that we

abstain in favor of the State court—stay our hand. Alabama Commission v. Southern R. Co., 341 US 341, 350 (1950); Glen Oaks Utilities, Inc. v. City of Houston, 280 F2d 330, 334 (5 Cir. 1960); Reid v. City of Norfolk, 179 FSupp 768, 773 (E.D.Va.—3-judge court—1960). Comity in these circumstances is quite unlike a deference exercised only because of the mere concomitance of the State suit—it is rather a refusal to frustrate a State judicial determination complete for all practical purposes.

The paramount ground for abstention, however, is that the resolution of conflicting views under the State law is the exclusive province of the State courts until a Constitutional question develops. But even then the question *must first* be left to the State courts to consider and decide it "in light of the constitutional objections presented to the [Federal court]." Government Employees v. Windsor, 353 US 365, 366 (1957). See Meridian v. Southern Bell T. & T. Co., 358 US 639, 640 (1959); Spector Motor Co. v. McLaughlin, 323 US 101, 104 (1944). In *Windsor* the decision was reversed because the complainant had not submitted the Federal issues to the State court.

The wisdom of this policy is now sharply exampled. Although in the Federal suit no ambiguity in the will is explicitly alleged nor guidance in administration specifically asked, in actuality both are pleaded. Instead of calling the testamentary restriction an ambiguity, it is described as an ineffective provision, and the college plainly desires to be advised on how to treat it in the operation of the institution. The action is brought by Sweet Briar as a testamentary trustee, administering its trust according to the law of Virginia, and it involves a question of statewide importance to Virginia: whether a private benefactor may establish and operate in the State a school exclusively for Negro or exclusively for white students. Thus it is particularly fitting that the adjudication be made primarily by Virginia courts. If that course had been pursued, the initial suit would have led to the desired

end: a declaration, with an ultimate Federal review, upon the effectiveness of the racial restriction when apposed to State enforcement and when apposed to the action of others. The results might well be different in the two aspects. Review of the decision upon the Federal points would be available in the United States Supreme Court or in this court.

Sweet Briar's counsel cannot be serious in urging that §§ 202, 203 and 207 of the Civil Rights Act of 1964, 42 USC 2000a-1, 2000a-2, 2000a-6, prevent abstention of the Federal court until the State court acts, for such a suspension by the Federal court was suggested by the college. In its amended bill of complaint in the State court, Sweet Briar explained that "it is exposing its Federal claims" to the *State* court while the Federal suit is pending. Furthermore, the cited sections of the Civil Rights Act of 1964 reveal in themselves that they refer solely to the exercise and denial of rights possessed by the public. See Sec. 201 (e). The right to enter Sweet Briar is certainly not a public right.

Indeed, the net effect of the plaintiff's procedure is to acknowledge the obligation of submitting the issue primarily to the State court. The following recital of the procedure discloses this intention:

(1) First, the Federal and State questions were initially submitted to the Circuit Court of Amherst County and there decided;

(2) Later, on the same grounds included in the State suit, plaintiff began this additional action in the Federal court;

(3) Then plaintiff amended the State complaint and asked the State court to *"dispose of the questions of State law in the light of complainant's Federal contentions"* reserving the right to go back to the Federal court, if not satisfied with the State court's ruling on the Federal issues; and

(4) Finally, plaintiff tells the State court that the college *may return there still again* if not satisfied with the Federal court's ruling on the Federal points.

Yet, now the college asks for an immediate adjudication by the Federal court.

Now opposing abstention, Sweet Briar argues that there is no ambiguity in the will or in the Virginia law necessitating an advance ruling by the State courts. Even if this contention be conceded, despite the doubt alleged of the effectiveness of the racial stipulation and the college's allegation of ambiguity in the State suit both originally and in the amendment, still the need for initial State court consideration remains. We have shown that the plaintiff must "expose", as it says, the restriction and the prohibitions to the State court under the focus of the Federal strictures upon them. In this at least the following questions seemingly need to be answered by the State court *in the light of the Federal Constitution:*

1. Whether a will made more than fifty years before the Supreme Court's racial decisions were rendered should be affected by these subsequent enunciations;

2. Whether Triplett v. Trotter, supra, decided in 1937, will still be retained by her courts as the law of Virginia in view of the racial decisions of the Federal courts since 1937;

3. Whether the testatrix included the racial stipulation in 1899 by reason of the existence of the Virginia statute or because of her own volition.[1] Cf. Justice Harlan dissenting in Evans v. Newton, 382 US 296, 315 (1966);

4. Whether, if the racial clause of the Williams will is held inoperative, the trust fails entirely; or can be

[1] It is said that this question is foreclosed by Griffin v. Maryland, 378 U.S. 130 (1964). There, however, the racial discrimination was committed by a State deputy sheriff, albeit at the instance of the proprietor of the amusement park, which undoubtedly endued the entire incident with State action. 378 U.S. at 135. Here, the discrimination was the act of the testatrix, a private citizen.

terminated by the Virginia legislature under section 55-34 of the Code of Virginia, 1950; or is subject to the application of the cy pres doctrine under section 55-31 of the Code; or some other disposition is proper;

5. Whether § 140 of the Virginia Constitution and § 22-221, Virginia Code, briefed by the college as unlawfully compelling racial segregation in private schools, apply to such schools; and

6. Whether the Virginia statutes pertaining to the conferring of academic degrees; exemption of property from condemnation and taxation; police protection; power of the State to abrogate the trust; and other subjects related to educational institutions, imbue Sweet Briar with a State character, as its brief suggests. These statutes appear in the Code of Virginia 1950 as the following sections: 23-9, 25-46.6, 55-34, 58-12 (reiterating here Va. Constitution § 183), 58-128, 19.1-28, 42-57 and 15.1-139.

III. The college, it is to be observed, would be the one hurt if this court entered upon a decision of this case forthwith. In reality, as we have noted, Sweet Briar has sought, and quite rightly, a judicial declaration upon the validity of the racial clause, but at this juncture this court could not give a complete answer. The reason is that the Federal court does not have the competence to do so.

At best it could only rule that the *State authorities* may not enforce the racial proviso—a narrow, negative disposition. That would not be an invalidation of the restriction for all purposes; its viability would not thereby be laid to rest. Any person in interest, such as a donor to the college, a minority member of the board of directors, or possibly others, it would seem,[2] could still question

[2] The Virginia statute on which the plaintiff relies, § 55-29, does not vest exclusively in the Commonwealth Attorney or the Attorney General the power to enforce the terms of a charitable trust. Indeed, it implies that there may be others who can do so. Otherwise, these officials would become the sole judges of the correctness of the trust administration.

the recent action of the college as ultra vires the corporation or the board, or in violation of the trust clause of the will. The college's or board's administration of the trust is always subject to the supervision of the State court. Virginia Code 1950, section 55-29, 31; Moore v. Downham, 166 Va. 77, 184 SE 199 (1936).

An analogy may be found in the Federal and State decisions upon the Girard will. The highest court of Pennsylvania, in In Re Girard College Trusteeship, 391 Pa. 434, 138 A2d 844 (1958), enforced a similar racial stipulation of the Girard will after the United States Supreme Court decision had held it unenforceable by the State. Pennsylvania v. Board of Trusts, 353 US 230 (1957). In doing so the State court distinguished the case from the earlier Supreme Court decisions to which the plaintiff here looks for its thesis that the race proviso is not enforceable, e.g. Barrows v. Jackson, 346 US 249 (1953) and Shelley v. Kraemer, 334 US 1 (1948). The Supreme Court refused to disturb the second Pennsylvania case. Worth noting, too, both Pennsylvania cases reached the Supreme Court only after passing through the State courts.

In Evans v. Newton, supra, 382 US 296, 300 (1966), speaking for the Court Justice Douglas said:

> "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."

Our citation of these decisions is not to predict the ultimate outcome of State court consideration of the instant clause, but solely to show that its potency would still be debatable if this case were not committed for that consideration. The point is that doubt of the legal and moral right of Sweet Briar to deviate from terms of the will

can plague the college until an answer is procured from the State courts. Meanwhile, the fractional decision this court is now asked to render might inadvertently mislead. The college, Government agencies, donors and students might be led to accept it as the final word on the issue, when it would not be.

For these reasons we deny at this time the relief prayed by the plaintiff. Jurisdiction of this suit will be retained but further prosecution of it will be stayed until the plaintiff exhausts the remedies available in the State courts of Virginia. In the event the plaintiff does not pursue these remedies within a reasonable time this suit will be dismissed with prejudice.

An order is today entered in accordance with the views expressed herein.

BUTZNER, J., dissenting:

I regret that I cannot join my brothers' view that we should abstain. I believe the federal questions raised in this action are independent and can be decided without resolution of state issues. Even if state law plays a crucial part, the defendants' plea that we abstain overlooks the college's argument that the state law is not ambiguous, that the Supreme Court of Appeals of Virginia has construed Virginia's pivotal statute, and that its decision is binding upon this court. Under these circumstances abstention is not appropriate. Cf. *Griffin* v. *School Board*, 377 U.S. 218, 229 (1964).

The college may prosecute simultaneous *in personam* actions in state and federal courts until one results in a judgment which can be asserted as *res judicata* in the other. *Kline* v. *Burke Const. Co.*, 260 U.S. 226 (1922). Abstention cannot be predicated on the defendants' plea.

of *res judicata*. Section 8-99, Code of Virginia 1950, provides in part:

> "In civil cases the court on motion of any party thereto shall, or of its own motion may, require the grounds of demurre relied on to be stated specifically in the demurrer; and no grounds shall be considered other than those so stated, but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before trial."

The statute applies when the demurrant states his grounds voluntarily. *Virginia & S.W. Ry. Co.* v. *Hollingsworth*, 107 Va. 359, 58 S.E. 572 (1907).

One defendant demurred on three specific state—not federal—grounds. The state judge wrote two opinions, which he incorporated in his order by reference. *Sweet Briar Institute* v. *McClenny*, No. 1383, June 3, 1965, April 6, 1966 (opinions); May 25, 1966 (order). He scrupulously observed the statutory restrictions limiting the scope of the demurrer and sustained it on state—not federal—grounds. He did not adjudicate the federal questions which the college asserts here.

The state court order sustaining the demurrer allowed the college to amend and continued the cause. The college amended, reserving for federal decision the federal questions. The order is interlocutory. § 8-462, Code of Virginia 1950; *Commercial Bank* v. *Rucker*, 2 Va. Dec. 350, 24 S.E. 388 (1896). Its lack of finality renders it insufficient to sustain the defendants' plea of *res judicata*. "• • • it is familiar law that only a final judgment is *res judicata* as between the parties." *G. & C. Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28 (1916).

The doctrine that a decree sustaining a demurrer decides every question which the parties might have litigated and had determined is not controlling. A federal court need not abstain from deciding a federal question when

the demurrer and the interlocutory decree sustaining it are drawn to dispose of the case on state grounds only. The rule expressed in *England* v. *Medical Examiners*, 375 U.S. 411 (1964) does not encompass this situation.

The federal questions which must be decided are: Do the Fourteenth Amendment and the Civil Rights Act of 1964 prohibit the state from enforcing the racially restrictive provisions of a will founding a private college? By enforcing the will, can the state compel the college officials, against their judgment, to exclude students on the basis of race?

The parties accept the premise that in the absence of state action the Constitution and laws of the United States do not prohibit a person from establishing by will a private college for the benefit of one race. But when the state—and not the college—enforces racial restrictions found in a will, the impact of state action must be examined in light of the Fourteenth Amendment and the Civil Rights Act of 1964. The pivotal issue is whether the discrimination is the product of state action. *Griffin* v. *Maryland*, 378 U.S. 130, 138 (1964) (Harlan, J., dissenting).

Consideration of the stance of the parties places the state and federal questions in perspective.

The college acknowledges that the defendants are authorized by § 55-29, Code of Virginia 1950,[1] to enforce

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[1] Code of Virginia 1950, § 55-29. *Appointment of trustees to hold such gifts, etc.; suits by and against them; settlement of their accounts and enforcement of the execution of the trust.*—When any such gift, grant or will is recorded and no trustee has been appointed, or the trustee dies or refuses to act, the circuit court of the county or the circuit or corporation court of the city in which the trust subject or any part thereof is, in the case of a gift or grant, or in which the will is recorded, may, on motion of the attorney for the Commonwealth in such court (whose duty it shall be to make such motion), appoint one or more trustees to carry the same into execution. * * * In enforcing the execution of any such trust a suit may be maintained against the trustees in the name of the Commonwealth when there is no other party capable of prosecuting such suit. * * * "

the testamentary trust creating Sweet Briar. The college, however, asserts that the defendants, under the authority conferred by § 55-29, cannot constitutionally enforce the racially restrictive language of the will. The college insists that the state is so involved with its origin and operation that a racially restrictive admission policy is the product of state action contravening Sweet Briar's rights under the Fourteenth Amendment.

The college's primary thrust is against § 55-26, Code of Virginia 1950,[2] which it contends validates bequests and devises for racially segregated schools only and leaves invalid bequests and devises for racially integrated schools.

A brief sketch of the history of charitable trusts in Virginia illustrates the college's position. *Gallego's Ex'rs* v. *Attorney General*, 30 Va. (3 Leigh) 450, 462 (1832) held that an Act of the General Assembly (Acts of Va., ch. 79, Dec. 27, 1792) repealed, in Virginia, England's Statute of Charitable Uses (1601), 43 Eliz. 1, c. 4, which permitted such devises for educational purposes. The common law of Virginia did not recognize the validity of charitable trusts in the absence of statute. Consequently, in *Literary*

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[2] Code of Virginia 1950, § 55-26. *Validity.*—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed to [sic] become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled "an act concerning devises made to schools, academies, and colleges." Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587; 1954, c. 145.)

Fund v. *Dawson*, 37 Va. (10 Leigh) 147 (1839), a devise for educational purposes was held invalid.

In 1839 a statute, validating devises for the education of white persons, was enacted. Acts of Va., ch. 12, April 2, 1839. Not until 1873 were devises for the education of Negroes valid. Acts of Va., ch. 263, Mar. 28, 1873. These statutes have been codified in § 55-26.

In April 1899 when the will benefiting the college was written and in 1900 when the testatrix died, the statute, for all purposes pertinent to this case, was similar to § 55-26.

The college relies upon *Triplett* v. *Trotter*, 169 Va. 440, 193 S.E. 514 (1937), as a definitive interpretation of the statute. There a will establishing an educational trust without racially restrictive language was attacked by heirs on the ground that it did not meet the requirements of the statute. The court said at 193 S.E. 515:

> "On their part [the heirs] contend that the gift [for an educational institution] is not validated by this section [§ 587, the predecessor to § 55-26], because, . . . :
>
> ". . . The will neither expressly nor impliedly shows whether the college is to be used for the education of white persons or colored persons, and such specification is required by the statute in the case of a trust for educational purposes.
>
> • • • • •
>
> ". . . The will fails to specify whether the beneficiaries are white or colored persons, hence the trust is too indefinite to qualify under the statute as a gift for charitable purposes.
>
> "With respect to their first contention appellants argue that the gift here, which is, in effect, for the purpose of aiding in the education of 'all worthy and dependent young men,' is not within the purview of section 587; that while the statute validates a gift for

the 'education of white persons' or a gift for the 'education of colored persons,' as separate classes, it was not designed to validate a gift, such as this, which fails to specify which class is intended.

"... Admittedly the language of the statute validates a gift for the education of either white or colored persons as separate classes. Here the testator leaves to the discretion of the self-perpetuating board of trustees the selection of the 'worthy and dependent young men' who are to be admitted to the college. They may select all applicants from one class, and reject all applicants from the other. So long as the trustees do this they are certainly carrying out the provisions of the trust. And just as certainly such a trust complies with the statute because it is a gift for the 'education of white persons' or for the 'education of colored persons.'

"But it is said that the language of the will is broad enough to permit the trustees to admit to the college both white and colored persons, and that surely this was not the intention of the framers of Code, section 587. [55-26]

"The answer to this argument is that the will does not compel the trustees to make their selection from both classes. They may select applicants from either. And we have just seen that the statute validates a gift for the education of either white or colored persons as separate classes.

* * * * *

". . .' "In the construction of wills the object is not to seek flaws and declare them invalid, but to sustain them if legally possible, and the presumption is that the testator intended a lawful rather than an unlawful thing. Therefore, where the language used in the will is reasonably susceptible of two different constructions, one of which will defeat, and the other

sustain the provisions, the doubt is to be resolved in favor of the construction which will give effect to the will, rather than the one which will defeat it."'

"Applying this principle, the trust is validated when we adopt the interpretation that the testator intended that the applicants for the college should come from one of the two classes, either white or colored, and not from both.

"We therefore reach the conclusion that the gift to establish and maintain a college for the education of such 'worthy and dependent young men' as may be selected by a board of trustees designated or provided for in the will, and as the income of the trust will permit, is on its face a valid gift for educational purposes under Code, § 587.

["]Having arrived at this conclusion, it becomes unnecessary that we discuss the admissibility and effect of the extrinsic evidence offered by appellees in support of their contention that the testator intended to benefit only white 'worthy and dependent young men.'["]

Bluntly stated, the college's position is that § 55-26, as construed in *Triplett,* prevents a Virginia citizen from leaving his property to establish an educational institution as he sees fit. He must leave it for the education of white students or Negro students. Regardless of his wishes, he cannot provide that his estate shall educate both white and Negro students in the same institution. Even if his will states no preference, his trustees must elect whether the beneficiaries are to be white or Negro.

Buttressed by the interpretation placed upon § 55-26 in *Triplett,* the college relies upon *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963) and Mr. Justice White's concurring opinion in *Evans* v. *Newton,* 382 U.S. 296, 302 (1966) to sustain its contention that the restrictive language

in the will must be deemed the product of Virginia law in effect at the testatrix's death.

As a further evidence of state action, the college points to § 140 of the Virginia Constitution[3] prohibiting integrated schools, the Sweet Briar charter granted by Act of the General Assembly[4] imposing racial restrictions in accordance with the language of the will, and miscellaneous statutes pertaining to colleges in general.[5]

Finally, the college relies upon §§ 202, 203, 204 and 207 of the Civil Rights Act of 1964.[6]

The defendants deny that § 55-26 compelled the testatrix to insert the racially restrictive provision in her will. They point out that *Triplett* v. *Trotter*, 169 Va. 440, 193 S.E. 514 (1937), was not decided until more than a third of a century after the will was written.

The defendants deny that they seek to enforce § 55-26, which they characterize as merely a declaratory statute validating charitable trusts.

The defendants assert that § 140 of the Constitution refers to public, not private, schools. They deny that the Act of the Assembly chartering the college and the miscellaneous statutes pertaining to colleges significantly involve the state in the affairs of the college.

The defendants characterize the will as private action founding a private college by a private individual for the

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[3] Va. Const. art. 9, § 140. *Mixed schools prohibited.*—White and colored children shall not be taught in the same school.

[4] Va. Acts of Assembly, Extra Sess. 1901, ch. 123, at 125, 128, includes a provision that the school or seminary is "to be known as the 'Sweet Briar institute,' for the education of white girls and young women."

[5] Code of Virginia 1950, §§ 23-9, 25-46.6, 58-12, 58-128, 19.1-28, 42-57, 22-221, 15.1-139, 55-27, 55-28, 55-30, 55-31, and 55-34, and *Va. Const.*, art. 13, § 183.

[6] 42 U.S.C. §§ 2000a-1, 2000a-2, 2000a-3, and 2000a-6.

members of a particular race. In urging that such a will violates no constitutional provision, they cite Mr. Justice Douglas' statement in *Evans* v. *Newton*, 382 U.S. 296, 300 (1966):

> "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered."

Although the defendants do not rely on § 140 of the Virginia Constitution or § 55-26, Code of Virginia 1950, the threat of state control over the admission policies of the college is real and imminent. After the college officials expressed their determination to admit Negroes, the Commonwealth's Attorney for Amherst County moved a state court to cite the Board of the College for contempt. In April 1966 the state court denied the motion. The state judge's opinion indicates, however, that the motion was denied because the college had not yet put into effect its proposed change in admission policy.

A state court has ruled that the language of the will is clear and unambiguous. For the purpose of this action, neither party alleges any ambiguity in the will. Both plaintiff and defendants are in agreement that the defendants are state officials charged by statute, § 55-29, with the responsibility of enforcing the trust creating the college.

The defendants, by claiming authority under § 55-29 to enforce the racial restrictions in the will without reliance upon § 140 of the Virginia Constitution and § 55-26, eliminate questions concerning the validity and application of these constitutional and statutory provisions. The defendants' position places in stark relief the federal questions that must be decided. Only if the state by enforcing the racially restrictive provisions of the will is empowered to compel the college officials against their judgment to exclude students on the basis of race need this court

pursue the allegations that the racial restrictions found in the will originated in state action repugnant to the Fourteenth Amendment.

The principles governing this case have been stated by the Supreme Court of the United States in *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957):

> "Stephen Girard, by a will probated in 1831, left a fund in trust for the erection, maintenance, and operation of a 'college.' The will provided that the college was to admit 'as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain.' The will named as trustee the City of Philadelphia. The provisions of the will were carried out by the State and City and the college was opened in 1848. Since 1869, by virtue of an act of the Pennsylvania Legislature, the trust has been administered and the college operated by the 'Board of Directors of City Trusts of the City of Philadelphia.' • • •
>
> "In February 1954, the petitioners Foust and Felder applied for admission to the college. They met all qualifications except that they were Negroes. For this reason the Board refused to admit them. They petitioned the Orphans' Court of Philadelphia County for an order directing the Board to admit them, alleging that their exclusion because of race violated the Fourteenth Amendment to the Constitution. • • • The Orphans' Court rejected the constitutional contention and refused to order the applicants' admission. • • • This was affirmed by the Pennsylvania Supreme Court. 386 Pa. 548, 127 A.2d 287.
>
> ["]The Board which operates Girard College is an agency of the state of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such

discrimination is forbidden by the Fourteenth Amendment. . . ."[7]

Application of the holding in the *Girard College* case may be found in *Griffin* v. *Maryland*, 378 U.S. 130, 136 (1964), which concerned the exclusion of Negroes from a private amusement park. The Court said:

> "The *Board of Trusts* [Girard College] case must be taken to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment."

The Supreme Court held in *Board of Trusts* that agents of the state, serving as trustees, could not constitutionally enforce the racially restrictive provisions of the will establishing Girard College. The case provides precedent for holding that state officials cannot enforce the racially restrictive provisions of the will establishing Sweet Briar College by compelling the Board, through threat of contempt, or otherwise, to admit only white students. Racial exclusion achieved by these means is the product of state action and is forbidden. Section 55-29 is not unconstitutional upon its face. However, the Fourteenth Amendment renders impermissible the use of this section to enforce racial segregation at the college.

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[7] Upon remand, the Philadelphia County Orphans' Court substituted trustees who were not officials of the City of Philadelphia. The Supreme Court of Pennsylvania affirmed. *In Re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958). The United States Supreme Court dismissed the appeal and denied certiorari, *sub nom. Pennsylvania* v. *Board of Directors of City Trusts*, 357 U.S. 570 (1958). The new trustees continued the exclusion of Negroes. The United States District Court for the Eastern District of Pennsylvania (Joseph S. Lord, III, J.) recently held that the Pennsylvania Public Accommodations Act, prohibiting racial discrimination, was applicable to Girard College. *Commonwealth* v. *Brown*, Civ. Action No. 39404, E.D. Pa., Sept. 2, 1966.

The court must also consider the college's alternative ground for relief under the Civil Rights Act of 1964. Cf. *Paul* v. *United States*, 371 U.S. 245 (1963); *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960).

Pertinent sections of this Act provide:

Section 202 (42 U.S.C. § 2000a-1):

"All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Section 203 (42 U.S.C. § 2000a-2):

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title."

Section 204 (42 U.S.C. 2000a-3[a]):

"Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. * * *"

Section 207 (42 U.S.C. 2000a-6[a]):

> "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law."

The legislative history indicates that Section 202 of the Act covers any establishment or place when discrimination is state imposed. Section 202 is not limited to places of public accommodation. This limitation is found only in Section 201.

H.R. Rep. No. 914, 88th Cong., 2d Sess. 2891, 2396 (1964) states:

> "Section 202 requires nondiscrimination in all establishments and places whether or not within the categories described in section 201, if segregation or discrimination therein is required or purports to be required by any State law or ordinance."

The breadth of Section 202 was recognized in the *Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152*, 88th Cong., 2d Sess., 2431, 2444 (1964):

> "3. There was added in the reported bill section 202 which did not appear in any previous version of the bill. This section would make unlawful 'discrimination or segregation of any kind on the ground of race, color, religion, or national origin' *'at' any establishment or place,'* if either purports to be required by any rule, order, etc., of any State or any agency or political subdivision thereof. This section is not limited to public places or facilities. As hereinafter pointed out, under the penal provisions of section 203, this amounts to an unconstitutional

abridgement of freedom of speech, freedom of the press, and attempted Federal control of State and municipal judges and law enforcement officers."

The hallmark of Section 202 is the source of the discrimination, not the kind of establishment. The Bureau of National Affairs commented upon Section 202 in *The Civil Rights Act of 1964: Text, Analysis, Legislative History* (1964), 85:

> "When segregation or discrimination is or purports to be required by state or local law or by order of state or local officials, then Title II's prohibition comes into play regardless of the public or private character of the facility involved and regardless of the type of service it renders or the type of clientele it serves. Section 202 prohibits discrimination in 'any establishment or place' where it is required by state law. Here seems to be implementation of the Fourteenth Amendment in its fullest scope. There is no requirement that the 'place' be one of 'public accommodation,' that it be a place of business, or even that it not be a private club."

Section 202 of the Act frees the college and its students from state imposed discrimination. Section 203 forbids the defendants' attempt to punish by contempt the college officials for exercising the rights granted by Section 202. Section 204 authorizes injunctive relief. This court must exercise the jurisdiction conferred upon it even though the plaintiff may have other remedies. Section 207 expresses a Congressional command that prohibits abstention.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

No. 66-C-10-L

SWEET BRIAR INSTITUTE, *Appellant,*

vs.

ROBERT Y. BUTTON,
Attorney General of the Commonwealth of Virginia, et. al., Appellee.

Order of Abstention

Upon consideration of the record and the arguments of counsel, on brief and orally, the court, for the reasons set forth in its opinion filed herein,

ORDERS:

1. That any further prosecution of this action be, and it is hereby, stayed and suspended upon the terms and conditions hereinafter set forth;

2. That the said stay and suspension shall remain in effect until the Circuit Court of Amherst County, Virginia, and the Supreme Court of Appeals of Virginia have considered and acted upon the State and Federal questions submitted, in both the original and amended complaints, to the Circuit Court of Amherst County in the suit therein styled Sweet Briar Institute v. William M. McClenny, et al. and designated as case No. 1383; and

3. That this court retain jurisdiction of this action pending the said stay and suspension, provided, however, that this action shall be dismissed with prejudice in the event the plaintiff shall not prosecute, with reasonable promptness and diligence, its said suit in the Circuit Court of Amherst County and in the Supreme Court of Appeals of Virginia.

And this action is continued upon the said terms and conditions.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ THOMAS J. MICHIE
United States District Judge

I dissent:
/s/ JOHN D. BUTZNER, JR.
United States District Judge

[Entered December 7, 1966.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT CHARLOTTESVILLE

CIVIL ACTION No. 66-C-10-L

SWEET BRIAR INSTITUTE, *Plaintiff*,

v.

ROBERT Y. BUTTON,
Attorney General for the Commonwealth of Virginia, et. al., Defendants.

Order on Post-Trial Motions

Upon consideration of the motions of the plaintiff, Sweet Briar Institute, for a new trial, for findings of fact and conclusions of law and for an injunction pending appeal, the court is of opinion and

ORDERS:

1. That no ground is shown warranting a new trial, and it is denied;

2. That the evidence, presented to the court by stipulation of counsel, disclosed no conflict of fact, and the written opinion of the court dated December 2, 1966 embraces an adequate statement of the court's findings of fact and conclusions, as allowed by Rule 52(a), Federal Rules of Civil Procedure, and the court adopting its opinion as such a statement, the plaintiff's request for further findings and conclusions is denied, except that

on the representation of plaintiff's counsel of its incorrectness, deletion will be made on page 3 of the opinion [App. A, p. 3a, *supra*] of the statement that Sweet Briar "has accepted Federal grants of moneys in the way of scholarships and other aid which are granted only to colleges not maintaining segregation by race or color";

3. That the phrase "or in this court" be deleted, as inaccurate in the context, on page 12 at the end of the hypothetical discussion carried over from page 11 of the opinion [App. A, p. 10a, *supra*];

4. That the opinion plainly shows, contrary to the apprehension expressed in the plaintiff's motions, that the plaintiff has the right to return to this court—after exhaustion of the State remedies for decision upon plaintiff's claims in the light of both State and Federal law—for a determination of plaintiff's claims under Federal law in the event plaintiff does not prevail in the State courts on its claims; that this was the reason for this court's retention of jurisdiction; but to be even more explicit, the court now reaffirms this right of the plaintiff; and

5. That in view of the defendants' continued adherence to the stipulation made by the parties at the conclusion of the hearing of this case that "until determination is made on the issues on the present hearing that things will remain in their present status," no reason appears for consideration of plaintiff's motion for an injunction pending appeal, and the motion is denied as moot at this time.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ THOMAS J. MICHIE
United States District Judge

For the reasons heretofore
stated in my separate opinion,
I maintain my dissent:

/s/ JOHN D. BUTZNER, JR.
United States District Judge

[Entered December 29, 1966.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT CHARLOTTESVILLE

CIVIL ACTION No. 66-C-10-L

SWEET BRIAR INSTITUTE, *Plaintiff*,

v.

ROBERT Y. BUTTON,
Attorney General for the Commonwealth of Virginia, et. al., Defendants.

Order Amending Order Filed December 29, 1966

The court having considered a communication from counsel for the plaintiff, Sweet Briar Institute, to the effect that the objection urged in its motion for a new trial in respect to the words thereafter quoted by the court in paragraph 2 of its order of December 29, 1966, is confined to the phrase "and other aid", it is now

ORDERED that the remainder of the said quotation be not deleted as directed in said paragraph 2 of said order, and that said paragraph 2 be amended accordingly, so that it shall read as follows:

"2. That the evidence, presented to the court by stipulation of counsel, disclosed no conflict of fact, and the written opinion of the court dated December 2, 1966 embraces an adequate statement of the court's findings of fact and conclusions, as allowed by Rule 52(a), Federal Rules of Civil Procedure, and the court adopting its opinion as such a statement, the plaintiff's request for further findings and conclusions is denied, except that on the representation of plaintiff's counsel ot its incorrectness, deletion will be made,

in the last paragraph on page 3 of the opinion, of the words "and other aid."

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ THOMAS J. MICHIE
United States District Judge

/s/ JOHN D. BUTZNER, JR., dissenting
United States Circuit Judge

[Entered January 12, 1967.]

APPENDIX B

VIRGINIA LEGISLATION AUTHORIZING AND GOVERNING EDUCATIONAL TRUSTS

Acts of Virginia General Assembly, Chapter 79, December 19, 1792:

An ACT repealing under certain restrictions, all statutes or acts of the parliament of Great Britain, heretofore in force within this commonwealth.

1. Whereas by an ordinance of convention, passed in the month of May, in the year of our Lord, one thousand seven hundred and seventy-six, intituled *"An ordinance to enable the present magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases, 'till the same can be more amply provided for,"* it is among other things ordained, "That the common law of England, or statutes or acts of parliament made in aid of the common law, prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force so far as the same may comply with the several ordinances, declarations and

resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony."

2. And whereas the good people of this commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the general assembly, during their present session, specially to enact such of the said statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of Virginia:

3. *Be it therefore enacted by the general assembly,* That so much of the above recited ordinance as relates to any statute or act of parliament, shall be, and is hereby repealed; and that no such statute or act of parliament shall have any force or authority within this commonwealth.

* * *

Acts of Virginia General Assembly, Chapter 12, April 2, 1839:

An ACT concerning devises made to schools, academies and colleges.

1. *Be it enacted by the general assembly,* That all devises or bequests of lands, tenements, hereditaments, goods and chattels, stocks and choses in action, hereafter given or made, for the establishment or endowment of any unincorporated school, academy or college within this commonwealth, for the education of free white persons, shall be good and valid in law and equity, except as is hereinafter provided.

* * *

* * * *Provided,* That nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary.

Acts of Virginia General Assembly, Chapter 263, March 28, 1873:

An ACT to Amend and Re-enact Section two of Chapter eighty of the Code of eighteen hundred and sixty, in Relation to Funds from Gifts, Grants, Devises and Bequests.

1. Be it enacted by the general assembly, That section two of chapter eighty of the Code of Virginia (edition of eighteen hundred and sixty) in relation to funds from gifts, grants, devises and bequests, be amended and re-enacted so as to read as follows:

§ 2. Every gift, grant, devise or bequest, which since the second day of April, in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this state (other than for the use of a theological seminary), and every gift, grant, devise or bequest, which since the tenth day of April, in the year one thousand eight hundred and sixty-five, has been, or at any time hereafter shall be, made for literary purposes or for the education of colored persons within this state (other than for the use of a theological seminary), whether made in either case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person * * *.

Code of Virginia (1887) Title 22, Chapter 65, Section 1420:

Every gift, grant, devise, or bequest which, since the second day of April, in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this state, and every gift, grant, devise, or bequest which, since the tenth of April, in the year one thousand eight hundred and sixty-five, has been, or at any time hereafter shall be, made for literary purposes, or for the education of colored persons within this

state, whether made in either case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person * * *. Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary.

Code of Virginia (1950):

§ 55-26. Validity.—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled "an act concerning devises made to schools, academies, and colleges." Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587; 1954, c. 145.)

* * *

§ 55-28. Probate of such will.—The attorney for the Commonwealth for any county or city in which such will could be offered for probate shall, in the name of the Commonwealth, institute all necessary proceedings to have such will admitted to record. (Code 1919 § 589.)

§ 55-29. Appointment of trustees to hold such gifts, etc.; suits by and against them; settlement of their accounts

and enforcement of the execution of the trust.—When any such gift, grant or will is recorded and no trustee has been appointed, or the trustee dies or refuses to act, the circuit court of the county or the circuit or corporation court of the city in which the trust subject or any part thereof is, in the case of a gift or grant, or in which the will is recorded, may, on motion of the attorney for the Commonwealth in such court (whose duty it shall be to make such motion), appoint one or more trustees to carry the same into execution. The trustees, whether appointed by, under, or by authority of such instrument, or under a charter of incorporation granted for the purpose of carrying out its provisions or under this section, may sue and be sued in the same manner as if they were trustees for the benefit of a certain natural person, or as such charter of incorporation may provide. The trustees shall annually render and state before the commissioner of accounts for the county or city wherein the trust subject, or the greater part thereof, is situated an account showing the investment of the trust funds, the receipts from such investment, or from other sources, and the disbursements of the same, in like manner as is required of every personal representative, guardian, curator, or committee, under chapter 2 (§ 26-8 et seq.) of Title 26. In enforcing the execution of any such trust a suit may be maintained against the trustees in the name of the Commonwealth when there is no other party capable of prosecuting such suit. The term "trustees" as herein used shall be construed to mean the persons, or governing body, charged with the execution of the trust, whether designated as "trustees", "directors" or otherwise. A motion under this section may be made before any court in the clerk's office of which such gift, grant or will is recorded. (Code 1919, § 590.)

• • •

§ 55-31. Indefiniteness not to defeat certain trusts.—When any corporation, firm association, partnership or

person gives, bequeaths, grants, conveys or devises any real or personal property in trust to or for any educational, charitable or eleemosynary purpose, the indefiniteness or uncertainty of the beneficiaries named in any instrument creating such a gift, bequest, grant, conveyence or devise, or the indefiniteness of the purpose of the trust itself, shall not defeat any such trust and, if the trust is in other respects valid under the laws of this State, it shall be administered to conform as near as may be to the purpose for which created or, if impossible of performance for this purpose, for some other educational, charitable, benevolent or eleemosynary purpose. However, unless the maker of the trust has specifically designated some other body, committee, agency or entity to determine what that purpose shall be and to administer the trust (in which event the determination and administration by that body shall be valid), the determination of the purpose of the trust shall be made by a court of equity in the county or city wherein the property or the greater part thereof is located and the administration of the trust shall be under the direction of such court.

The provisions of this section shall not apply to or affect any trust or fund which is the subject of pending litigation. (1946, p. 294; Michie Suppl. 1946, § 587a.)

* * *

§ 55-34. Power of General Assembly over devises, etc.—In case any devise or bequest authorized by § 55-26 shall hereafter be made, the General Assembly, as to any such, reserves the right at any time to suspend or repeal the authority thereby given. But if in any case it shall do so, it shall provide that the subject of such devise or bequest shall vest or be vested in such person, his heirs, executors or administrators as could have been entitled had the devise or bequest not been made. (Code 1919, §593.)

Acts of Virginia General Assembly, Chapter 29, February 8, 1908:

An ACT to authorize and empower incorporated educational institutions to sell and convey real estate in excess of 1,000 acres under certain conditions.

1. Be it enacted by the general assembly of Virginia, That in all cases where an incorporated educational institution, or its board of directors, or trustees, for its benefit, own or hold more than one thousand acres of land in one tract or in several adjoining and contiguous tracts, outside of a city or incorporated town, such board of trustees or directors may, notwithstanding any provision in its charter, or in the deed, will or other muniment of title under which said real estate is held, by a majority vote of all the members of such board, sell and convey all of such real estate in excess of one thousand acres, the portion to be sold to embrace both land and buildings as may be determined by such board.

As the inability to sell a portion of their property is hampering the development of some of the educational institutions of this State, and in view of the emergency existing by reason thereof, this act shall be in force from its passage.

APPENDIX C

Demurrer and Opinions and Order Sustaining It. in State Court

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY

DEMURRER

SWEET BRIAR INSTITUTE, *Complainant*

v.

WM. M. MCCLENNY, Commonwealth Attorney for Amherst County, Virginia

and

ROBERT Y. BUTTON, Attorney General for the Commonwealth of Virginia, *Respondents*

The demurrer of Wm. M. McClenny, Commonwealth Attorney for Amherst County, Virginia to the Bill of Complaint exhibited against him and Robert Y. Button, Attorney General for the Commonwealth of Virginia.

The respondent says that the Bill of Complaint is insufficient in law, and especially in this:

(1) That the complainant has not alleged an actual controversy nor any instance of actual antagonistic assertion and denial of right under Virginia Code Section 8-578.

(2) That there is no ambiguity under the terms of the will of Indiana Fletcher Williams requiring Court interpretation.

(3) That the Bill of Complaint does not state changes in circumstances, conditions, customs and laws affecting Sweet Briar Institute which would merit change in its charter.

/s/ WM. M. MCCLENNY
Commonwealth Attorney for Amherst County, Virginia

/s/ WM. M. MCCLENNY p.d.
Amherst, Virginia

[Filed October 14, 1964]

TWENTY-NINTH JUDICIAL CIRCUIT

COUNTY OF AMHERST—COUNTY OF NELSON—
CITY OF WAYNESBORO

WAYNESBORO, VIRGINIA

C. G. QUESENBERY
Judge

June 3, 1965

Mr. Frank G. Davidson, Jr.
Attorney at Law
Lynchburg, Virginia

Mr. Wm. M. McClenny
Attorney at Law
Amherst, Virginia

In re: Sweet Brier Institute

Gentlemen:

This proceeding was brought as a result of a resolution of the Board of Directors of Sweet Brier Institute, passed at the meeting held on November 1, 1963, in which the Board, after five paragraphs of preamble, had this to say in substance. The resolution authorized the Executive Committee of the Board of Directors, "to take whatever legal action maybe necessary and appropriate to secure a Judicial determination as to whether we may consistently, with the charitable purposes of Indiana Fletcher Williams, admit qualified persons to Sweet Brier College, regardless of race".

A further paragraph and the language we are concerned with is that portion of the Will of the late Indiana Fletcher Williams, which provides in part as follows: "to impart to its students such education in sound learning and such physical, moral and religous training as shall in the judgement of the Directors, best fit them to be usefull members of society, as a perpetual memorial to her deceased daughter,

Daisy Williams". A further provision of the Will, provided that the funds derived from this estate should be used to establish and carry on a school or seminary for the education of "white girls and young women".

This suit is brought in the name of the Sweet Brier Institute, and William M. McClenny, Commonwealth's Attorney from Amherst County and Robert Y. Button, Attorney General for the Commonwealth of Virginia, are made parties defendant to the suit. No other persons or parties are named as defendants in this action. The Attorney General filed an answer on behalf of the Commonwealth and the Attorney for the Commonwealth for Amherst County filed a demurrer, setting up three grounds and it is on this demurrer that the case must now be decided.

The first question presented is whether or not an actual controversy exist, which would permit filing the suit for a declaratory judgement under Virginia Code Section 8-578.

A careful reading of the bill, filed in the case and the resolution of the Board of Directors, which authorized this proceeding, second paragraph of the resolution: "certain questions have been raised as to the intention of the testatrix since her death in 1900, because of substantial changes involved in customs". At no place can we find any antagonistic assertion by anyone and there must be a controversy, actual in fact to give this Court jurisdiction to decide the case on any ground.

The spirit of the times or we might better say the hysteria of the times has probably generated the thinking of the Board in this case, and certainly the fact that Sweet Brier Institute has been operated on a highly successful basis and in accordance with the Terms of the Will of the Donor and for more than sixty years, conclusively negatives the idea that there is any controversy concerning the meaning of the language contained in the Will. The Will was obviously carefully drawn by an able At-

torney, and in it is set out a fairly complete plan for the personal representives or trustees to follow in setting up the Institute, this, was done in accordance with the Will and it's Terms and as was said before, the operation has been a highly successful one and a great credit to the people who have operated it, and certainly a wonderful memorial to the daughter of the Donor. It is difficult to see how this proceeding, under these circumstances, can be brought under the Title 8-578 of the Code, as interpreted by our Court of Appeals in Chick V. McBain, 157 Va 66.

The second point involved is whether or not the Will is ambiguous and if so, Sweet Brier would certainly have the right to have this Court interpret it and lend its assistance and guidance in carrying out the Terms of the Will, if there is any ambiguity.

Again, may it be said that the proceedings as a whole does not disclose any ambiguity, a term which is sought now to be changed, is a very simple statement, "For the education of white girls and young women". This question was not raised in the original suit for the interpretation of the Will more than sixty years ago. The Will was perfectly plain then and understood and has been unchanged and apparently understood for more than sixty years and operating thereunder a very successful educational institution, it has made a large contribution to our social life and society generally. Accordingly it is the Courts opinion that there is no ambiguity in the Terms of the Will of Indiana Fletcher Williams, which requires the Court to make an interpretation.

The third question is whether in this proceeding, circumstances have so changed which would merit a change in the meaning of the language of the Will, while this point is not necessary to a decision in the case, in view of the holding that no controversy exist, and that there is no ambiguity in the Will, nevertheless it might be well to point out that the application of the doctrine which is urged by

Counsel, for the Institute, the cy pres doctrine or the doctrine of deviation would not apply. In most cases the foregoing doctrines are applied at the initiation of the Foundation or Trust and the Courts have supplemented the language of the Donor's Will or other instrument by suppling needed omissions, which would permit an intelligent and orderly conduct of the objective plan, under the Terms of the instrument involved, here we are not confronted with that as the plan has been in operation for more than sixty years, very successfully so.

A further observation, which seems of considerable importance to everyone involved, is the fact that if this Foundation or Trust is by application of the cy pres doctrine or by some strange interpretation of the language in the Will, be brought within the purview of the fourteenth amendment, it will likewise be brought within the shadow of the first amendement, with regard to religion. This being true then the interpretation which would bring the Institute under the fourteenth amendment would certainly place it in a position, where religous training would be contrary to the Constitution, as presently misinterpretated by the Court in Washington. The effect would therefore be not only to change the entire language of the Will, opening up the system to other classes of students and would in the end eliminate the religous training which was obviously one of the primary purposes of the Will of Mrs. Williams.

It is observed from the foregoing comments, the Court is of the opinion that: (1) no controversy exists, (2) that the Will of Mrs. Williams is not ambiguous and there fore needs no further interpretation and (3) that the application of the cy pres or deviation doctrine would not be proper in any event and if applied as urged by the Attorney for the complainant, it would destroy the entire purpose of the Will.

Very cordially,

/s/ C. G. Quesenbery

TWENTY-NINTH JUDICIAL CIRCUIT

COUNTY OF AMHERST—COUNTY OF NELSON—
CITY OF WAYNESBORO

WAYNESBORO, VIRGINIA

C. G. QUESENBERY
Judge

April 6, 1966

Mr. Frank G. Davidson, Jr.
Attorney at Law
925 Church Street
Lynchburg, Virginia

In re: Sweet Briar Institute
v.
McClenny

Dear Mr. Davidson:

I have again reviewed the entire case from beginning to end. The motion made by Mr. McClenny is one that cannot be considered lightly and I felt that it would be helpful to once again consider the arguments and authorities originally submitted.

I have been unable to reach any conclusion, which differs in any respect from my original pronouncement last June. At no point in the case has anyone seriously represented to the Court that they didn't understand the language of the donar of the Trust. It is only since the inauguration of the system, which Washington uses so effectively to garner votes and to destroy the integrity of the principles which were once regarded with respect in our society, by returning a small part of the tax money, taken from us, in the form of so called "grants and loans" has brought about the result of substituting the bureaucracy of large governmmant for the intelligence of local, earnest people, who have, up to this time administered the affairs of pri-

vate trusts and I might also add of our local government that any question has been raised.

With the advent of the grants and loans, which Washington offers, it is easy to understand why people who wish to make a showing of their work, would be anxious to obtain these funds and especially when they see others receiving them. People are likely to substitute money for integrity and this has occurred so extensively in our society that it has almost come to be a way of life, which is generally accepted.

In my review of the cases, I have found no law which supports the view that the integrity of this trust should be violated, sofar as the Courts in Virginia are concerned. Nor have I encountered any law in the state, which permits a deviation from the plain language of a trust, and so this is to affirm in all detail my original finding in this case.

The defendant seeks to have the case dismissed on the ground that it is frivolous, I see no good purpose in granting this request, although it is obvious that no one was seriously seeking an interpretation of the plain language of the trust.

It is also urged that this Court hold the Directors in contempt. The record does not disclose that there has been any change in the admission policy since my letter of last June, which could be considered contrary to the Court's ruling and accordingly, I do not find that the Board is in contempt.

Finally, it is apparent that the present Board has been seriously affected by the loan and grant system employed by Washington. In this connection it might be pointed out that the donar of the trust, specifically said that it should be self supporting. This means in my judgement that she did not want the monument to her daughter to be supported by going to the capitol in Washington with cup in hand to support the institution. The whole idea would be

repugnant to her, and it is contrary to the language directing that the trust be made self sustaining. The Boards up to this time have been able to do this and while it may be a little more difficult, it would seem to this Court that the integrity of private property and of private trusts in Virginia are of much greater importance than the acquisition of funds from a government which will place restrictions and restraints upon the operation of the trust and destroy private property rights.

On the whole it is clear that this action, seeks only to break down and destroy the plain language of the trust. Accordingly, an order will be entered dismissing this proceeding in accordance with the terms of my letter of last June.

Very cordially yours,

/s/ C. G. Quesenbery

CGQ/mq

cc: Mr. Wm. M. McClenny
Attorney at Law
Amherst, Virginia

Virginia:

IN THE CIRCUIT COURT OF AMHERST COUNTY

Sweet Briar Institute, *Complainant*

Vs.

Wm. M. McClenny, Commonwealth's Attorney, Amherst County, Virginia
and
Robert Y. Button, Attorney General for the Commonwealth of Virginia, *Respondents*

ORDER

This proceeding which came on to be heard on the Complainant's Bill of Complaint, the Answer of Robert Y.

Button, Attorney General for the Commonwealth of Virginia, the Demurrer of Wm. M. McClenny, Commonwealth's Attorney of Amherst County, Virginia, the Motion of Wm. M. McClenny, Commonwealth's Attorney in writing to dismiss the proceedings on grounds therein stated.

Upon Consideration Whereof, it appearing to the Court (1) That no controversy was alleged or shown to exist by the Bill of Complaint and or pleadings; (2) That no ambiguity existed in the will of Indiana Fletcher Williams and therefore no further interpretation of said will is needed or required; (3) That the application of the cy pres or deviation doctrine would not be proper in any event and if applied as urged by Sweet Briar Institute it would destroy the meaning and purpose of the Indiana Fletcher Williams' will.

That although it is apparent that Sweet Briar Institute was not seriously seeking an interpretation of the plain language or the trust set up by Mrs. Indiana Fletcher Williams no good purpose appears to the Court to dismiss the proceedings on the ground that it is frivolous. That the pronouncements of the Court under date of June 3, 1965 and April 6, 1966 more fully and at large describe the Court's findings and opinion and should be incorporated into this decree by reference and Court doth Adjudge, Order and Decree.

(1) That the motion of Wm. M. MC Clenny filed July 9, 1965 to summarily dismiss this cause is hereby denied and accordingly said motion is overruled.

(2) That the Court doth sustain the demurrer of the respondent, Wm. M. McClenny, Commonwealth's Attorney of Amherst County, Virginia, to the complainant's bill and said bill is hereby dismissed.

(3) That complainant's motion to file an amended and supplemental bill, a copy of which bill has been tendered to the Court for filing is approved, and the Clerk is di-

rected to receive the original thereof and make it a part of the record in this proceeding.

The complainant, by counsel, duly objected and excepted to the action of the Court in sustaining the demurrer of Wm. M. McClenny to the complainant's bill of complaint for the following reasons:

(a) Said bill of complaint alleges facts showing an actual controversy;

(b) Said bill of complaint alleges facts showing changes in circumstances, conditions, customs and laws which would justify the application of the cy pres or deviation doctrine, and said facts are admitted by the demurrer of Wm. M. McClenny; and

(c) The Court's failure to determine that any attempt by the Attorney General of the State of Virginia or the Commonwealth's Attorney of Amherst County, Virginia to enforce against complanant the racially discriminatory requirement of Section 1420 of the Virginia Code of 1887 (Section 55-26 of the Virginia Code of 1950) or the racially discriminatory language required by said statute to be contained in the will of Indiana Fletcher Williams would violate the equal protection clause of the 14th Amendment of the Constitution of the United States of America and Sections 202-204 of the Civil Rights Act of 1964; and this cause is continued.

Entered this 25th day of May, 1966.

/s/ C. J. Q.
Judge

[Typographical errors in this Appendix are in originals.]

SUPREME COURT, U.S.
MAY 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1106

SWEET BRIAR INSTITUTE,

Appellant,

v.

ROBERT Y. BUTTON, ET AL.,

Appellees.

Appeal from the United States District Court
for the Western District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. McILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

WILLIAM M. McCLENNY
Commonwealth's Attorney for Amherst County

Amherst, Virginia

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1106

SWEET BRIAR INSTITUTE,

Appellant,

v.

ROBERT Y. BUTTON, ET AL.,

Appellees.

Appeal from the United States District Court
for the Western District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated April 24, 1967, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the United States District Court for the Western District of Virginia abstaining from further consideration of the instant case pending consideration and action by the appropriate State courts of both the State and Federal questions sought to be presented here and simultaneously pending in the courts of the Commonwealth. In accordance with the request con-

tained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by this appeal, file this statement in opposition to appellant's jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On April 25, 1966, plaintiff instituted in the United States District Court for the Western District of Virginia this suit for preliminary and permanent injunctions allegedly to restrain the enforcement, operation and execution by defendants of Section 55-26 of the Code of Virginia (1950). Jurisdiction was invoked under 28 U.S.C.A. 1331 and 1343(3), (4); Sections 202-204 and 207 of the Civil Rights Act of 1964; the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C.A. 2281 and 2284—the latter two statutes providing for the convening of a District Court of three judges to hear and determine suits in which restraint of the enforcement of a State statute, upon the ground of such statute's unconstitutionality, is sought.

A District Court of three judges having been designated by the Chief Judge of the United States Court of Appeals for the Fourth Circuit, defendants filed their joint motion to dismiss the complaint on May 16, 1966, setting forth therein the several grounds upon which such motion was predicated. One of the grounds stated in defendants' mo-

* Post, Appendix A.

tion invoked the doctrine of abstention by asserting that the District Court should not entertain the suit because the provisions of Virginia law to which reference was made in the complaint had not been authoritatively construed by the Supreme Court of Appeals of Virginia with respect to the situation set forth in the complaint and, therefore, the constitutional issues sought to be presented might be modified or removed if the provisions of Virginia law in question were first considered by the courts of the Commonwealth of Virginia. Plaintiff subsequently amended the original complaint to include a request for a declaratory judgment and the cause was heard on the record made, trial briefs and oral argument on July 6, 1966. Subsequently, on December 7, 1966, the District Court filed its opinion and order staying and suspending further prosecution of the action "until the Circuit Court of Amherst County, Virginia, and the Supreme Court of Appeals of Virginia have considered and acted upon the State and Federal questions submitted, in both the original and amended complaints, to the Circuit Court of Amherst County in the suit therein styled Sweet Briar Institute v. William M. McClenny, et al. and designated as Case No. 1383; . . ." See, Jurisdictional Statement, p. 28a. The District Court retained jurisdiction of the action pending the above-mentioned stay and suspension.

STATEMENT OF FACTS

Plaintiff in the case at bar, Sweet Briar Institute, is a private, non-stock corporation created pursuant to the last will and testament of its founder-benefactress, Indiana Fletcher Williams, dated April 3, 1889, for the purpose of establishing and maintaining in Virginia "a school or seminary for the education of white girls and young women." See, Jurisdictional Statement, p. 2a.

Defendants in the instant case are the Commonwealth's Attorney for Amherst County, Virginia, in which Sweet Briar Institute is located, and the Attorney General of Virginia.

On August 17, 1964, plaintiff filed in the Circuit Court of Amherst County, Virginia, a bill of complaint requesting a judicial interpretation and construction of the above-mentioned last will and testament and praying the aid, guidance and direction of that court with respect to the authority of the directors of Sweet Briar Institute to admit otherwise qualified applicants for admission without regard to race or color. Named as defendants in that suit were the Commonwealth's Attorney for Amherst County and the Attorney General of Virginia, both of whom filed timely pleadings in response to the bill of complaint, including an answer by the Attorney General of Virginia.

On June 3, 1965, and April 6, 1966, the Circuit Court of Amherst County, by letter memoranda, initially indicated and subsequently confirmed that it was of the opinion that (1) no actual controversy existed (2) that the relevant language of the will under consideration was not ambiguous or in need of judicial interpretation (3) that application of the cy pres or deviation doctrine would not be proper under the circumstances and (4) that an order would be entered dismissing the complaint. On May 25, 1966, an order effectuating the court's decision was duly entered, which order also permitted the plaintiff to file an amended and supplemental bill of complaint, and directed the clerk of the Circuit Court of Amherst County to receive the amended and supplemental bill and make it a part of the record in the State court proceedings. (Jurisdictional Statement, p. 47a)

The amended and supplemental bill, which set forth in detail the precise question sought to be tendered in the instant

proceedings, was subsequently filed pursuant to the above-mentioned order, and the defendants subsequently filed their joint answer joining in the prayer of the amended and supplemental bill that the will of Indiana Fletcher Williams be interpreted and construed in light of the facts and circumstances set out in the amended and supplemental bill, that the parties be accorded the aid, guidance and direction of the court with respect to such matters and that the court render a declaratory judgment making a binding adjudication of the rights, duties, powers and authorities of the parties. This cause is now pending in the Circuit Court of Amherst County, Virginia.

THE STATUTE INVOLVED

Under consideration in the instant proceedings is Section 55-26 of the Code of Virginia (1950) which provides:

> "Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.' Nothing in this

section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary."

QUESTION PRESENTED

Did the District Court abuse its discretion in abstaining from a consideration of the constitutional issues sought to be presented in the instant case until the appropriate State court had considered and decided both State and Federal questions in a companion action previously instituted by plaintiff and simultaneously pending in the State court?

ARGUMENT

The District Court Did Not Abuse Its Discretion In Invoking The Doctrine Of Abstention In The Case At Bar

During the course of its opinion, the District Court reviewed the prior history of the instant litigation in the State court, noting (1) that the plaintiff had elected to institute in the Circuit Court of Amherst County an action against the identical parties who are appellees here (2) that in those proceedings the plaintiff attacked the challenged racial restriction as violative of the Fourteenth Amendment (3) that the State Court had announced its decision before the present suit was filed in the District Court (4) that the decree effectuating the State court's opinion allowed the plaintiff to amend its complaint and (5) that the State case now stands for hearing on the amended complaint in the State court. See, Jurisdictional Statement, p. 4a.

Thereafter, the District Court stated (Jurisdictional Statement, p. 4a):

> "Relying upon the plaintiffs' [sic] election to proceed first in the State court, the present pendency of that case and the decision rendered therein, the defendant officials moved for dismissal of the Federal suit, or

for abstention here from further proceedings until the college had carried its case through the State courts, trial and appellate. After considering the record and the arguments of counsel on brief and orally, we have decided to abstain.

"This course is dictated *first* because the law does not allow the prosecution of a second suit after a concomitant suit has been decided. *Next,* it is dictated by the established principle that the Federal courts should not pass upon controversies primarily dependent for solution upon local law until the State courts have ruled upon them in consideration of the Federal grounds of attack. Thirdly, only through abstention here can the college procure a complete answer to its desire for a judicial ruling upon the present vitality of the restriction."

Although exhaustive consideration was accorded each of the above specified grounds of abstention by the District Court, it clearly pointed out that (Jurisdictional Statement, p. 9a):

> "The paramount ground for abstention, however, is that the resolution of conflicting views under the State law is the exclusive province of the State courts until a Constitutional question develops. But even then the question *must first* be left to the State courts to consider and decide it 'in light of the constitutional objections presented to the [Federal court].' Government Employees v. Windsor, 353 US 365, 366 (1957). See Meridian v. Southern Bell T. & T. Co., 358 US 639, 640 (1959); Spector Motor Co. v. McLaughlin, 323 US 101, 104 (1944). In *Windsor* the decision was reversed because the complainant had not submitted the Federal issues to the State court."

The propriety of the District Court's invocation of the doctrine of abstention for this paramount reason is easily demonstrable. A mere reading of the complaint filed and the statute challenged in the instant proceedings clearly

establishes that the case at bar is one in which the federal question sought to be tendered by appellant is admittedly and entirely dependent upon the subordinate interpretation of the statute under attack. While appellees basically maintain that appellant's constitutional contention is without merit under any circumstances, it is indisputable that such contention is altogether lacking in substance unless the challenged statute—*as matter of State law*—requires the construction appellant seeks to place upon it. It is not too much to say that, unless the statute under consideration requires the interpretation appellant ascribes to it, there is no federal constitutional issue in this case at all.

It is a well recognized and firmly precedented rule that Federal courts will not exercise their equity powers to prevent the operation of a State statute or undertake to decide cases presenting federal constitutional issues when those issues might be substantially modified or entirely removed by a State court determination of the State law involved. A host of decisions of this Court, with which each member of this Court is thoroughly familiar, can easily be marshaled to support the validity of this principle and to demonstrate its applicability to the case at bar. *Clay* v. *Sun Ins. Office*, 363 U.S. 207; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167; *Louisiana Power and Light Company* v. *Thibodaux*, 360 U.S. 25; *Government & C.E.O.C., C.I.O.* v. *Windsor*, 353 U.S. 364; *Leiter Minerals, Inc.* v. *United States*, 353 U.S. 220; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496

In *Louisiana Power & Light Co.* v. *Thibodaux, supra*, this Court reversed a judgment of the Court of Appeals for the Fifth Circuit and reinstated an order of the District Court for the Eastern District of Louisiana staying further proceedings in an expropriation suit, pending in the district court, until the Supreme Court of Louisiana had been afforded an opportunity to interpret the Louisiana

statute upon which the city's authority to expropriate was predicated. Particularly pertinent to the issue presented in the case at bar are certain portions of the dissenting opinion. Although expressing the view that the failure of the district court to exercise jurisdiction was inappropriate under the circumstances of that case—primarily because no injunctive relief, which would have prohibited State officials from acting, was sought and because the case did not involve the potential friction which results when a federal court applies paramount federal law to strike down state action—the dissenting justices nevertheless fully acknowledged "the two recognized situations justifying abstention" and commented upon them in the following language (360 U.S. at 32-33):

> "* * * The doctrine of abstention originated in the area of the federal courts' duty to avoid, if possible, decision of a federal constitutional question. This was Railroad Com. v. Pullman Co., 312 US 496, 85 L. Ed. 971, 61 S.Ct. 643. * * * *Numerous decisions since then have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might moot the issue or put the case in a different posture.*"

In *Government & C.E.O.C., CIO* v. *Windsor, supra,* this court held that a three-judge District Court should refrain from deciding the constitutionality of the State statute there involved until definite determinations had been made by the State courts of local law questions. In this connection, the Court pointed out (353 U.S. at 366):

> "* * * In an action brought to restrain the enforcement of a state statute on constitutional grounds, *the federal court should retain jurisdiction until a definite determination of local law questions is obtained from the local courts.* * * * The bare adjudication by the Alabama Supreme Court that the union is subject to

this Act does not suffice, *since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court.* If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner. * * *" (Italics supplied)

So clear is it that numerous subsidiary questions of local law require authoritative interpretation by the Virginia courts in light of appellant's federal constitutional claims that the District Court had no difficulty in specifying a number of them in the following language (Jurisdictional Statement, pp. 11a-12a):

"We have shown that the plaintiff must 'expose', as it says, the restriction and the prohibitions to the State court under the focus of the Federal strictures upon them. In this at least the following questions seemingly need to be answered by the State court *in the light of the Federal Constitution:*

1. Whether a will made more than fifty years before the Supreme Court's racial decisions were rendered should be affected by these subsequent enunciations;

2. Whether Triplett v. Trotter, supra, decided in 1937, will still be retained by her courts as the law of Virginia in view of the racial decisions of the Federal courts since 1937;

3. Whether the testatrix included the racial stipulation in 1899 by reason of the existence of the Virginia statute or because of her own volition.[1] Cf. Justice Harlan dissenting in Evans v. Newton, 382 US 296, 315 (1966);

4. Whether, if the racial clause of the Williams will is held inoperative, the trust fails entirely; or can be terminated by the Virginia legislature under section 55-34 of the Code of Vir-

ginia, 1950; or is subject to the application of the cy pres doctrine under section 55-31 of the Code; or some other disposition is proper;

5. Whether § 140 of the Virginia Constitution and § 22-221, Virginia Code, briefed by the college as unlawfully compelling racial segregation in private schools, apply to such schools; and

6. Whether the Virginia statutes pertaining to the conferring of academic degrees; exemption of property from condemnation and taxation; police protection; power of the State to abrogate the trust; and other subjects related to educational institutions, imbue Sweet Briar with a State character, as its brief suggests."

With respect to what is perhaps the foremost of the State law questions, counsel for appellant lay great stress upon the decision of the Supreme Court of Appeals of Virginia in *Triplett* v. *Trotter*, 169 Va. 440, 193 S.E. 514, asserting that in that case the Virginia Supreme Court held that the segregation requirement must be read into every bequest or devise for establishment or maintenance of an educational institution, even though such bequest or devise be silent on the subject of racial segregation. No such language appears in the opinion in that case, either by way of holding, dictum or collateral observation. Under consideration in *Triplett* was the validity under Virginia law of the provisions of a will establishing a trust to assist "all worthy and dependent young men to obtain a business education . . ." *Triplett* v. *Trotter, supra,* at 442. The Court's holding in that case is contained in the following language (169 Va. at 445):

"We, therefore, reach the conclusion that the gift to establish and maintain a college for the education of such 'worthy and dependent young men' as may be selected by a board of trustees designated or provided

for in the will, and as the income of the trust will permit, is on its face a valid gift for educational purposes under Code, section 587."

Moreover, the *Triplett* case was not decided until 1937, some forty-four years after the execution of the will of Indiana Fletcher Williams. Thus, even if the decision in that case could be read in the manner for which plaintiff contends, it could not possibly have played any part in the execution of the will here under attack.

Quite to the contrary, the status of the decisional law in Virginia with respect to the validity of educational trusts at the time of the execution of the will of Indiana Fletcher Williams is reflected in *Protestant Episcopal Evangelical Society* v. *Churchman,* 80 Va. 718, decided in 1885. In that case, the Supreme Court of Appeals of Virginia held valid, under the provisions of what is now Section 55-26 of the Virginia Code, a bequest "for educating poor young men for the Episcopal Ministry . . ." *Protestant Episcopal Evangelical Society* v. *Churchman, supra,* at 756. No provision was made in the will there under consideration with respect to any racially segregated classification of the beneficiaries of the trust and none was required for validation of the trust. So far as counsel for defendants are aware, there has been no decision of the Supreme Court of Appeals of Virginia which invalidated a trust for educational purposes because the beneficiaries of such trust were not classified on the basis of race, nor has there been any decision of the Supreme Court of Appeals of Virginia validating a trust made expressly for the benefit of a biracial class. Certainly, there is no provision of Virginia law which specifically invalidates a trust of the latter type.

In addition, it is clear that an authoritative interpretation of Section 140 of the Virginia Constitution and Section 22-221 of the Virginia Code is necessary to any consideration of

appellant's claims arising under Sections 202-204 and 207 of the Civil Rights Act of 1964. 42 U.S.C.A. §§ 2000a-1 through 2000a-3, 2000a-6, (1964). In this connection, appellant asserts that the above specified provisions of Virginia law require racial segregation in *private* schools. By contrast appellees—pointing out that the provisions in question are found in the Virginia law relating to the establishment of *public, free* school system throughout the Commonwealth—insist that these provisions do not now and never have been applicable to private schools in general or to Sweet Briar Institute in particular. Clearly, no proper consideration can be given by this Court to this aspect of appellant's case until these Virginia constitutional and statutory provisions have been accorded authoritative interpretation by the Supreme Court of Appeals of Virginia.

In light of the foregoing, counsel for appellees submit that the instant litigation presents a classic case for application of the abstention doctrine. In its amended and supplemental bill of complaint—which was pending in the State court when the instant case was heard—Sweet Briar Institute asked the State court to interpret Section 55-26 of the Virginia Code "in light of the constitutional objections" sought to be presented to the District Court. See, *Government & C.E.O.C. CIO* v. *Windsor, supra,* at 366. Thus, appellant has raised in the State court the precise issue of statutory interpretation, within the context of its constitutional contentions, which it would have the District Court prematurely and inappropriately pass upon in advance of a State court's determination of the local law questions upon which appellant's entire constitutional claim is predicated. Had the District Court ignored the doctrine of abstention and undertaken to proceed to a consideration of the Federal constitutional issues posed by appellant, the District Court would have had to decide these subsidary questions of State law itself. This procedure would neces-

sarily have entailed a forecast by the District Court of the only authoritative opinion which can be rendered upon such questions—that of the Supreme Court of Appeals of Virginia. Only by requiring completion of the process of State court adjudication which appellant voluntarily elected to initiate can the Federal questions in this case be presented to this Court in clean cut form, unclouded by doubts concerning the proper resolution of the underlying State law questions. This procedure is not only consistent with that by which both of the *Girard College* cases and *Evans* v. *Newton*, 382 U.S. 296, reached this court, but any other procedure would manifestly be antagonistic to the consistent pronouncements of this Court. See, *Pennsylvania* v. *Board of Trusts*, 353 U.S. 320 (1957); *Pennsylvania* v. *Board of Trusts*, 357 U.S. 570 (1958). See also, Jurisdictional Statement, p. 13a.

In addition, counsel for appellees wish to emphasize that the appellant has controlled the course of this litigation from its inception in the Circuit Court of Amherst County, and is entirely responsible for the procedural disarray with which the District Court was confronted. Commenting upon the appellant's procedure in this connection, the District Court pointed out (Jurisdictional Statement p. 10a-11a):

> "Indeed, the net effect of the plaintiff's procedure is to acknowledge the obligation of submitting the issue primarily to the State court. The following recital of the procedure discloses this intention:
>
> > "(1) First, the Federal and State questions were initially submitted to the Circuit Court of Amherst County and there decided;
> >
> > "(2) Later, on the same grounds included in the State suit, plaintiff began this additional action in the Federal court;

"(3) Then plaintiff amended the State complaint and asked the State court to '*dispose of the questions of State law in the light of complainant's Federal contentions*' reserving the right to go back to the Federal court, if not satisfied with the State court's ruling on the Federal issues; and

"(4) Finally, plaintiff tells the State court that the college *may return there still again* if not satisfied with the Federal court's ruling on the Federal points.

"Yet, now the college asks for an immediate adjudication by the Federal court."

Surely, the well-nigh schizophrenic display of forum shopping evidenced by the above quoted chronology cannot be countenanced under the previously cited decisions of this Court. See also, *England* v. *Medical Examiners*, 375 U.S. 411; *Tomiyasu* v. *Golden*, 9 Cir., 358 F. (2d) 651. It is perfectly apparent that appellant—disappointed with the decision of the Circuit Court of Amherst County—has attempted to substitute resort to the District Court for an appeal from the order of the State court. As appellant states in its jurisdictional statement, the original bill of complaint in the State court was filed on August 17, 1964, oral arguments were heard in December, 1964, and the State court's opinion indicating its disposition of the case was announced, by letter memorandum to counsel, on June 3, 1965. Less than a year elapsed from initiation of the State court proceedings to their disposition by the trial court, with right of appeal to the Supreme Court of Appeals of Virginia. Yet, instead of seeking immediate entry of an order effectuating the decision of the State trial court so that a proper appeal might be perfected, appellant—after the expiration of a period of over nine

months—instituted the present litigation in the District Court.

Sweet Briar Institute now attempts to make it appear that appellees are responsible for the almost amorphous procedural posture of this litigation. Referring to the State trial court's opinion of June 3, 1965, counsel for appellant make the astounding assertion that at this point "a state court decree sustaining the demurrer was available to *appellees* for the asking." (Emphasis supplied) See, Jurisdictional Statement, p. 12. Surely, such a statement cannot conceal the fact that such a decree was equally available to *appellant* for the asking and should have been promptly sought by Sweet Briar Institute so that the State trial court's disposition of appellant's claims could be reviewed by the Supreme Court of Appeals of Virginia, with right of further review of appellant's Federal claims by this Court. Indeed, counsel for appellees submit that if this manifestly appropriate course had been followed, the litigation initiated by Sweet Briar Institute in the Circuit Court of Amherst County in 1964 would have completed its passage through the Supreme Court of Appeals of Virginia and, if successfully prosecuted to this Court by either party, be now *properly* pending for review of the decision of the highest court of the Commonwealth. That such is not the case is entirely the result of appellant's attempt to substitute an independent Federal court action for a direct State court appeal, and to prosecute separate actions involving the same questions in both the State and Federal courts at the same time. The District Court properly refused to place its imprimatur on such procedural behavior, aptly characterizing it as "a maneuver sharply disapproved by the Supreme Court." See Jurisdictional Statement, p. 8a.

Surely, in light of the prior procedural history of this litigation when the case was heard by the District Court,

it cannot be said that the District Court abused its discretion in abstaining from a consideration of the constitutional issues sought to be presented, until the appropriate State court had considered and decided both State and Federal questions in the companion action which appellant had previously instituted and which was then simultaneously pending in the State court.

CONCLUSION

As previously stated, counsel for appellees assert that the instant litigation presents a classic case for application of the abstention doctrine; indeed, a more appropriate case for invocation of the doctrine can hardly be imagined. Counsel for appellees submit therefore that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellees in the above-captioned matter, hereby certify that copies of this Statement of Appellee Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 5th day of May, 1967, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Frank G. Davidson, Jr., Esq., P. O. Box 1160, Lynchburg, Virginia, and Thomas S. Currier, Esq., 1801 Westview Road, Charlottesville, Virginia, counsel for appellant.

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Assistant Attorney General

Appendix "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 24, 1967

The Honorable Robert Y. Button
Attorney General of Virginia
State Library Building
Richmond, Virginia

RE: SWEET BRIAR INSTITUTE v. BUTTON, ET AL.
No. 1106, October Term, 1966

Dear Sir:

The above-captioned appeal was docketed in this Court on March 1, 1967, and our records indicate that you were served with a copy of the jurisdictional statement.

The Court has directed this office to request that you file on or before May 5, 1967 a response to the jurisdictional statement. Such a response usually takes the form of a motion to dismiss or affirm.

Forty printed copies of your response, together with proof of service thereof, should be forwarded to reach this office before the May 5 deadline. However, if you are unable to have it printed in that period of time, you may forward forty typewritten or otherwise reproduced copies.

Very truly yours,

JOHN F. DAVIS, Clerk

By: MICHAEL RODAK, JR.
Deputy Clerk

jmh

cc: William M. McClenny, Esq.
Frank G. Davidson, Jr., Esq.
Thomas S. Currier, Esq.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SWEET BRIAR INSTITUTE *v.* BUTTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 1106. Decided May 29, 1967.

PER CURIAM.

The judgment of the United States District Court for the Western District of Virginia is reversed. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). The case is remanded for consideration on the merits. Section 202 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–1. *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.